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The Court of Civil Appeals of Texas has, in the recent case of Kosminsky v. Raymond, considered the question as to the validity of the act of an attorney in taking acknowledgment, as notary, to papers in the case in which he is interested. The court first filed an opinion holding that an attorney, although a notary public, was not, under such circumstances, authorized to administer the oath to a garnishee. Upon a rehearing, this opinion was withdrawn, where, upon a further consideration of the question, the court became convinced that it had erred in its ruling. The court said there was no statute in Texas which prohibits an attorney from acting as a notary public, and the law, in express terms, confers upon a notary the power to administer oaths and take affidavits of parties to written instruments. Some of the courts, in upholding such affidavits, have always spoken of the impropriety of such an act, but in the absence of a statute or rule of court, attorneys have been permitted to act as notaries in such cases. The court cited precedents from Indiana, Massachusetts, Minnesota and California, where this point has arisen. In Young v. Young, 18 Minn. 94, the court, while holding that an attorney may, as notary, take the affidavit of his client, said "that it is now, and has been for many years, the practice in this State, and, however improper or reprehensible the practice may be, there is nothing in the law which prohibits it." The Texas court, in disposing of the matter, said: "Viewing the question solely from the standpoint of propriety, we are not disposed to encourage this practice, but viewing it in its legal aspect, there is no rule of law existing on this subject which prohibits an attorney from taking the affidavit of his client."

A decision of the Supreme Court of Utah—Short v. Bullion-Beck Champion Mining Co.—involving a legal aspect of the eight-hour law question, has attracted considerable attention. The court undertook to construe a recent statute of Utah, which, in effect, provides that the period of employment of workingmen in mines and smelters shall be eight hours per day, and making it a misdemeanor for any person or corporation to violate the provisions of the act. The court, in the case alluded to, held that this statute applies with equal force to the employer and the employee, and a person who works for another, in a mill or reduction works, more than eight hours per day, cannot recover on a *quantum meruit* for his services during the overtime; that a limitation of the duration of a day's work in certain employments, known as the "Eight-Hour Law," is a valid exercise of the police power of the State, and creates for the employee a legislative protection which is without his power to waive; and that a servant may claim neither an express nor an implied contract to pay for services rendered under a contract of employment which is in violation of laws fixing a penalty for doing the act upon which recovery is sought, and in no case can a contract be implied when the parties to it are *in pari delicto*, and where plaintiff, to make his case, must resort to the illegal transaction in proof and pleading. The decision cannot be reasonably criticised. It seems good law that if a person be precluded from employing laborers to work more than a legal number of hours, employees shall not be permitted to recover for extra work over the legal limitation of hours. The statutory provision of Utah, under consideration in this case, has been before the Supreme Court of the United States, and its validity has been upheld. .Holden v. Hardy, 169 U. S. 366.

NOTES OF IMPORTANT DECISIONS.

CRIMINAL LAW—PARDON — PAROLE—RE-ARREST.—In Fuller v. State, 26 South. Rep. 146, decided by the Supreme Court of Alabama, it was held that under a statute of that State, providing that, on failure of a convict to observe the conditions of his parole, the governor may direct his re-arrest and return to custody, and he shall be required to carry out the sentence of the court as though no parole had been granted; a paroled convict, having broken the condition of his parole, even after the time his sentence would have ended but for the suspension, may be remanded to custody, that the unserved part of the sentence may be executed on him. The court said in part: "The parole does not in anywise displace or abridge the sentence. It merely stops its execution for a time only, it may be, or indefinitely, it

may prove. It suspends, not destroys. The suspension is like that which occurs constantly in the administration of criminal laws where the defendant appeals from the judgment of conviction. The execution of the sentence is by the appeal superseded and postponed pending the appeal, and, if the judgment is affirmed, the execution of the sentence thereupon begins, and continues for the period set down originally in the judgment. So the word is used in this statute, and, upon condition broken, the sentence, which has all along hung in its entirety over the liberty of the paroled convict, is to be executed upon him 'as though no parole had been granted to him.' This is the plain meaning of the statute; and, so interpreted, it involves, of necessary consequence, the proposition that upon condition broken, even after the time at which the sentence would have ended but for its suspension the convict may still be remanded to custody, that the unserved, and hence unexpired, part of the sentence—that part which he was released from serving during the period of durance originally specified—may be executed upon him. So the law is written.

"That it was competent for the legislature to so provide we entertain no serious doubt. A parole, like every other pardon, is subject to rejection or acceptance by the convict. He has an unfettered election in that regard, and the executive order is not effective or operative until it has been accepted by him. If he prefers to serve out his sentence, as originally imposed upon him, to a suspension of it by subjecting himself to the conditions nominated in the parole, he has the clear right to do so. But if he elects to accept the parole, and avails himself of the liberty it confers, he must do so upon the conditions upon which alone it is granted to him. One of these conditions is that his sentence shall continue *in fieri*, and that the governor shall have the power to execute it in full upon him should he forfeit the liberty and immunity conditionally secured to him by the executive order. That a convict, having only a short time remaining of his sentence, would make an unwise choice by accepting a parole, upon onerous conditions, for a breach of which he might, years after, be remanded to complete his sentence, affords no argument against the constitutional integrity of the enactment. That a person cannot, by convention with the governor, become a convict, and that by mere convention with the executive a convict cannot alter his term of servitude, or the dates at which it is to begin and end, is no impeachment of a statute which provides for such alterations—for the suspension of a sentence during a part of its original period, and its execution as to such part at a time beyond that fixed in the judgment of conviction for its termination. The same power which provides for the original sentence—the law-making power of the land—provides, also, in this instance, for its suspension, and for its ultimate execution, in a given contingency, at another and different time, and it is equally potent in both respects. And the postponing of the sentence in such case is not merely by convention with the governor, but is, by force of a potential statute, well within legislative competency to deal with the execution of sentences imposed upon convicts. It is the law that in such case postpones, under certain circumstances, the execution of the sentence to another time, just as it is the law which postpones, upon appeal taken, the execution of sentence until another time. So it has been ruled of a similar statute in Massachusetts (Conlon's case, 148 Mass. 168, 19 N. E. Rep. 164); such is the view of the Supreme Court of Minnesota, expressed in a well considered opinion (State v. Wolfer [Minn.], 54 N. W. Rep. 1065); and in South Carolina a like result is rested alone upon the governor's constitutional pardoning power (State v. Barnes, 32 S. Car. 14, 10 S. E. Rep. 611, and cases there cited). And at an earlier day it was supposed in Massachusetts to be necessary to provide by statute that the time during which the convict is at large under parole should not be deducted from the unexpired sentence upon his remandment for breach of the condition of the parole, to the end that he should be made to serve beyond the time fixed for the termination of the original sentence. West's case, 111 Mass. 443. This statute was afterwards amended as indicated in Conlon's case, *supra*. See also on the general question of the constitutionality of statutes providing for paroling convicts. State v. Peters, 43 Ohio St. 659, 4 N. E. Rep. 81.

"But it is insisted that this statute, in so far as it undertakes to authorize the governor to determine that the condition of the parole has not been complied with, and the summary arrest of the convict thereupon by the direction of the governor, and his summary return or remandment to servitude or imprisonment under the sentence, is violative of organic guaranties of jury trial, that no warrant shall be issued to seize any person without probable cause, supported by oath or affirmation, etc. This position takes no account of the fact that the person being dealt with is a convict, that he has already been seized in a constitutional way, been confronted by his accusers and the witnesses against him, been tried by the jury of his peers secured to him by the constitution, and by them been convicted of crime, and been sentenced to punishment therefor. In respect of that crime and his attitude before the law after conviction of it, he is not a citizen, nor entitled to invoke the organic safeguards which hedge about the citizen's liberty, but he is a felon, at large by the mere grace of the executive, and not entitled to be at large after he has breached the conditions upon which that grace was extended to him. In the absence of this statute, a convict who had broken the conditions of a pardon would, if there were no question of his identity or the fact of breach of the conditions, be subject to summary arrest and remandment, as matter of course, to imprisonment, under the original sentence, by the court of his conviction,

or any court of co-ordinate or superior jurisdiction—a purely formal proceeding. If the person arrested denied his identity with the convict sought to be remanded, he might be entitled to a jury trial on that issue alone. If he denied only the alleged breach of the conditions of his enlargement, he would not be entitled to a jury on that issue, but it would be determinable in a summary way, by the court before whom he is brought. But the statute supervenes to avoid the necessity for any action by the courts in the premises. The executive clemency under it is extended upon the conditions named in it, and he accepts it upon those conditions. One of these is that the governor may withdraw his grace in a certain contingency, and another is that the governor shall himself determine when that contingency has arisen. It is as if the convict, with full competency to bind himself in the premises, had expressly contracted and agreed that whenever the governor should conclude that he had violated the conditions of his parole an executive order for his arrest and remandment to prison should at once issue and be conclusive upon him. Of course, if, in the execution of the order of arrest, the wrong man should be taken, he would be entitled to enlargement on *habeas corpus;* but there is no question of identity in the case before us. Upon such determination by the governor, evidenced by the executive order of arrest, the parole is avoided, and the person who has been at large upon it at once falls into the category of an escaped convict, so far as measures for his apprehension and remandment under the original sentence are concerned, and he is no more than an escaped convict entitled to freedom from arrest, except upon probable cause, supported by oath or affirmation, nor to a trial by jury, nor to his day in court for any purpose. Kennedy's Case, 135 Mass. 48; Conlon's Case, 148 Mass. 168, 19 N. E. Rep. 164; Arthur v. Craig, 48 Iowa, 264; State v. Wolfer (Minn.), 54 N. W. Rep. 1065.

"Appellant relies mainly upon the case of People v. Cummings, decided by the Supreme Court of Michigan. Neither the argument nor the conclusion in that case is satisfactory, and its unsoundness is demonstrated, we think, in the notes appended to the report of it in 14 L. R. A. 285, 50 N. W. Rep. 310. The order of the probate judge denying the convict's petition for *habeas corpus* is in consonance with the foregoing views, and it will be affirmed."

NEGLIGENCE OF DRIVER—INJURIES ON HIGHWAY—UNMANAGEABLE HORSE.—The Court of Appeals of Maryland, in Creamer v. McIlvain, 43 Atl. Rep. 935, decides that the fact that one of two persons riding together drove recklessly, does not tend to show recklessness on the part of the other, who was driving three-quarters of an hour later, when the horses ran away and caused injuries to other travelers; that the fact that a pair of colts, not three years old, and little used to harness, attempted to run away when the yoke strap broke and let the pole down with a loud report, does not show a tendency on their part to run away, existing five or six years later; and that the driver of a horse need not discontinue his drive simply because the horse, which has always been gentle and easily managed, shows signs of being unruly. On the main question involved the court says: "In Arnold v. Norton, 25 Conn. 92; Kittredge v. Elliott, 16 N. H. 77; Loomis v. Terry, 17 Wend. 496; Buckley v. Leonard, 4 Denio, 500; and Mann v. Weiand, *81 Pa. St. 243, cited by the appellants, the liability of the owners of dogs was under consideration; and although in some of them it was held that there is no rule which requires any particular number of instances of unprovoked biting to prove a mischievous disposition in a dog to bite mankind, and that one instance might be sufficient under some circumstances, they do not go to the extent of holding that one such attack by a dog would be sufficient evidence of such disposition, if the facts disclosed that the dog was provoked, or that the biting was under circumstances that would not indicate a mischievous propensity. We will not stop to emphasize the fact that in all those cases dogs, and not horses, were being considered, or to comment on the distinction made in the authorities between dogs and horses. In Cockerham v. Nixon, 33 N. Car. 269, which was a case of a bull injuring the plaintiff's horse, it was held that when the owner of an animal knows, or has good reason to believe, that he is likely to do mischief, he must take care of him, and that it makes no difference whether the ground of suspicion arises from one act, or from repeated acts; but it was also said that the act done must, however, be such as to furnish a reasonable inference that the animal is likely to commit an act of the kind complained of. In Simson v. Omnibus Co., L. R. 8 C. P. 390, the plaintiff was a passenger in the omnibus of the defendant, and the court held that there was sufficient evidence of negligence to justify the lower court in submitting the case to the jury. There the plaintiff was injured by the kick of one of the horses, but it was proven that the omnibus bore evidences of other kicks, and that no precaution had been taken, by the use of a strap, or otherwise, against the possible consequences of a horse kicking, and no explanation was offered by the defendant. In Benoit v. Railroad Co., 154 N. Y. 223, 48 N. E. Rep. 524, the general principles governing the liability of the owner of domestic animals for personal injuries caused by them are discussed; and after referring to injuries caused by kicking, biting, or other vicious propensities of such animals, which are known to the owner, and how such knowledge may be brought home or imputed to him, the court said: 'In the absence of such knowledge or notice, an injury caused by such animal gives no right of action; but when the vicious habit or character of the animal becomes known to the owner, and he thereafter continues to keep the animal, he keeps it at his peril, and renders himself liable for any subsequent injury to another

caused by its viciousness.' That court also held that there was error in the court below in submitting to the jury the fact that the horse had run away on a previous occasion as evidence of a propensity to run, and added that: 'We think the rule laid down by the court on the trial extends beyond reasonable limits the liability of owners of horses, and imposes a burden not sanctioned by any case that has come to our notice.' In O'Brien v. Miller, 60 Conn. 214, 22 Atl. Rep. 544, it was held that the mere fact that a team was running away did not, as a matter of law, raise a presumption of negligence on the part of the driver. In Unger v. Railway Co., 51 N. Y. 499, the court said that the explanation of the defendant's witnesses as to how the runaway happened, which was uncontradicted, sufficiently explained the transaction to acquit the defendant of negligence. See also Holmes v. Mather, L. R. 10 Exch. 261; Manzoni v. Douglas, 6 Q. B. Div. 145; Cadwell v. Arnheim, 152 N. Y. 184, 46 N. E. Rep. 310. Other cases might be cited, but the above are sufficient to show the views that have generally been taken by the courts; and we know of no authority that would justify the court in permitting a jury to infer negligence simply because the defendant's horses ran away, and an accident happened, without some evidence of the circumstances under which it occurred. A horse of ordinary spirit that will not run away under any circumstances would be a rare animal, and to hold that, simply because one did run off on one occasion, a jury would be justified in finding that he was vicious, wild, or prone to run, would enable jurors to find verdicts on mere speculation and guesses, instead of evidence."

CARRIERS OF GOODS—SELECTION OF ROUTE.—One point in the case of Post v. Southern Ry. Co., 52 S. W. Rep. 301, decided by the Supreme Court of Tennessee, is of special interest, inasmuch as the authorities on the subject are somewhat conflicting. The decision of the court was that where goods are tendered for shipment to a point beyond the initial carrier's line, and there are several routes equally safe, prompt, reliable and cheap, such carrier cannot be compelled to accept the goods to be carried over one route in preference to another, at the shipper's option, unless some reason appears therefor; especially where the use of one route may be advantageous to the carrier, without injury or sacrifice to the shipper; that an initial carrier cannot be compelled to make a through shipment to a point beyond its line over a particular route, merely to enable the shipper or consignee to get a rebate under a secret agreement with a certain line; and that an initial carrier is liable to the shipper for loss from its selection of an insolvent company as the connecting line in a through shipment to a point beyond its line. The court says in part: "Upon the abstract question as to whether the initial railroad company or the shipper has the right to designate the route of through shipments at through rates lower than local rates, while there is some conflict of authority, we think the weight of it, as well as the reasons, are in favor of the right of the railroad company to make the designation, and enforce it, when there are several lines equally prompt and reliable offered the shipper. It is virtually conceded that a railroad company cannot be required, as a legal obligation, to carry freights beyond its own terminal points, and this is in accord with the great weight, if not universal holding, of the cases. Express Cases, 117 U. S. 1, 29, 6 Sup. Ct. Rep. 542, 628; Coles v. Railroad Co. (Ga.), 12 S. E. Rep. 749; Myrick v. Railroad Co., 107 U. S. 102, 1 Sup. Ct. Rep. 425; Hunter v. Railway Co. (Tex. Sup.), 13 S. W. Rep. 190; Bird v. Railroad Co., 99 Tenn. 719, 42 S. W. Rep. 451; Transportation Co. v. Bloch, 86 Tenn. 415, 6 S. W. Rep. 881; Elliott, R. R. § 1432; Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co., 41 Fed. Rep. 563; St. Louis Drayage Co. v. Louisville & N. R. Co., 65 Fed. Rep. 41. This being both conceded and established, we think it must, upon authority and reason, follow that, if a railroad company does undertake to carry beyond its own terminus, it may limit its liability to its own line (Bird v. Railroad Co., 99 Tenn. 719, 42 S. W. Rep. 451, and cases cited), and it may determine what agencies it will select to make such further carriage. The Supreme Court of the United States, in the case of Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co., 110 U. S. 680, 4 Sup. Ct. Rep. 191, says: 'At common law a carrier is not bound to carry except on its own line, and we think it quite clear that, if he contracts to go beyond, he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to the extension of his line for the purpose of the contract, and, if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way, he may nevertheless confine himself to the particular route he chooses to use. He puts himself in no worse position by extending his route with the help of others than he would occupy if the means of transportation were all his own. He certainly may select his own agencies and his own associates for doing his own business.' This language is cited and applied by the United States Circuit Court of Appeals, Fifth Circuit, in the case of Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co., 30 C. C. A. 151, 86 Fed. Rep. 416, the court saying: 'We listened attentively and with interest to the able oral arguments of counsel who appear for appellee, and we have diligently examined the printed brief which they submit, and the numerous authorities cited thereon, but we do not find in all that they have advanced, or in any of the authorities we have examined, anything to weaken the force of the above suggestions, and the authority on which such suggestions rest.' In the case of Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co., 41 Fed. Rep. 563, Caldwell, J., says: 'At common law a carrier is not bound to carry except on his own line, and we think it quite

clear that, if he contracts to go beyond, he may, in the absence of statutory regulations, determine for himself what agency he will employ;' citing in support of the opinion Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co., 110 U. S. 667, 4 Sup. Ct. Rep. 185. And in the case of St. Louis Drayage Co. v. Louisville & N. R. Co., 65 Fed. Rep. 41, the language of the court in the 110 U. S. and 4 Sup. Ct. Rep. case is quoted and approved. In both of these cases, as well as in the case of Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co., 59 Fed. Rep. 400, the principle is clearly established that the matter of through tariffs and through arrangements made by one railroad company with other carriers is wholly within the discretion of the first carrier, and that a court of equity has no power to compel one carrier to make these arrangements with another, or to require one carrier to accept through freights or passengers tendered by another.

"It is insisted that this principle is controlling of the case at bar, because, if the initial carrier has the right to make these arrangements and connections with other lines, he has the right at any moment to discontinue them, and the mandatory injunction issued in the case seeks to compel the defendant company to keep up these arrangements, whether they prove satisfactory or not. In the case of Bird v. Railroad Co., 99 Tenn. 719, 722, 42 S. W. Rep. 452, the court, speaking through Justice Caldwell, thus announces the proposition: 'The first carrier had the legal right, at its election, to undertake the transportation of the goods to the terminus of its own line merely, or to their ultimate destination. It was under no legal obligation, in the first instance, to transport them beyond the end of its own line; and for that reason it was authorized in the law, when contracting for such through transportation, to limit its liability by the clause mentioned.' Transportation Co. v. Bloch, 86 Tenn. 415, 6 S. W. Rep. 881; Railroad Co. v. Brumley, 5 Lea, 401; Dillard v. Railroad Co., 2 Lea, 288; Telegraph Co. v. Munford, 87 Tenn. 190, 10 S. W. Rep. 318; Lawson, Carr. § 236; Schouler, Bailm. § 603; 2 Am. & Eng. Enc. Law, 866, 867; Ror. R. R. p. 1222; Lotspeich v. Railroad Co., 73 Ala. 306. Mr. Elliott, in his latest work on Railroads, lays down the general doctrine as follows (section 1432): 'As a general rule, no carrier is bound by law to accept and carry goods beyond the terminus of its own line. In the absence of any agreement, either express or clearly implied, for transportation beyond its own line, the common-law duty of an independent carrier is performed by safely transporting the goods over its own line, and delivering them to the consignee or connecting carrier, as the case may be.' It has been uniformly held that the courts cannot compel a railroad company to enter into through traffic arrangements with other lines of railroad, it being a matter wholly within its discretion, and for its sole determination. Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co., 41 Fed. Rep. 563; St. Louis Drayage Co. v. Louisville & N. R. Co., 65 Fed. Rep. 41. If this be true, and a carrier can refuse to make such through arrangements, certainly it can refuse to use them after being made, if for sufficient reasons it does not desire to do so. The case of Bird v. Railway Co., 99 Tenn. 722, 42 S. W. Rep. 451, recognizes the right of the carrier to refuse to carry beyond its own line, or, if doing so, to limit its liability. If it can impose the condition of limited liability, it certainly can refuse to carry, if the privilege of selecting its connecting agencies is not given to it. In the 110 U. S. and 4 Sup. Ct. Rep. case, cited above, the rule is stated that, in the absence of statutory regulations, the carrier may select the agency it chooses to use. See also Pullman's Palace Car Co. v. Missouri Pac. Ry. Co., 115 U. S. 587, 6 Sup. Ct. Rep. 194; Chicago Ry. Co. v. Pennsylvania Ry. Co., 1 Interst. Commerce Com. R. 86; Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 Fed. Rep. 567; Chicago & N. W. Ry. Co. v. Osborne, 3 C. C. A. 347, 52 Fed. Rep. 915; Little Rock & M. R. Co. v. St. Louis S. W. Ry. Co., 11 C. C. A. 417, 63 Fed. Rep. 775; St. Louis Drayage Co. v. Louisville & N. R. Co., 65 Fed. Rep. 39; Detroit, G. H. & M. Ry. Co. v. Interstate Commerce Commission, 21 C. C. A. 103, 74 Fed. Rep. 838; Mattingly v. Pennsylvania Co., 2 Interst. Commerce Com. R. 806. The reasons why carriers should have this right to designate routes are forcibly stated by the witness Culp, who, it is shown, has an experience of 28 years in the traffic departments of railroads. He says: 'Satisfactory arrangements necessary to be made with all parts of the line for operation of through rates include proportions to be allowed each carrier; the ability of the connecting lines to transport the traffic with the utmost speed; the solvency of different parts of the line; their willingness to and ability to promptly settle claims, either for loss to property, overcharge in rates, or loss of cars or other property of the company; reciprocity on the part of the connecting line in delivering freights to the defendant for transportation over its line in return for freights delivered to such connecting lines by it; participations in salaries and expenses of agencies established for procurement of traffic; compliance with the law, State and national, with respect to rates applying to traffic over such other lines; friendly co-operation of connecting lines, and performances of the duty so as to satisfy patrons, and increase business; that it may not be compelled to send its cars over connecting lines which will not promptly return them; in order to select such connections as are able to furnish it a proportion of cars needed by the through lines; that it may not be required to haul cars to Memphis empty, to meet requirements of shippers in order to load their freight, while it may have a supply of empty cars on hand to be returned by other routes; so to distribute its tonnage as not to congest one or more of the roads, while forwarding so little traffic over other lines as to cause them to form other connections, to the disadvantage of the Southern Railway.' He con-

tinues: 'To promptly handle freight, defendant should, from time to time, select some particular carrier as against others. It is necessary at times to send a larger percentage of business than usual via particular line, in order to return loaded cars which would otherwise return empty, or to furnish loads for steamships which would otherwise be compelled to sail from port without loads.' Illustrating this, he cites cases of steamships plying from the ports of Brunswick, Pinner's Point, and other South Atlantic seaports, to New York, Philadelphia, and other North Atlantic seaports, running in connection with the Southern Railway Company. It may be necessary, in order to load a ship sailing from Brunswick at one particular time to route all, or practically all, of its freight to that port, when the next day the situation may be reversed, and it may have to send all of its freight to Norfolk; the making of arrangements to increase the efficiency of the carriers; the necessity of looking to the solvency of lines over which their business is to be transported and their cars sent; and the willingness and ability of such connecting lines to pay claims for loss of property, and for car mileage. See, on this subject, Ray, Neg. Imp. Duties (Freight Carr.), pp. 668, 669. The case of Coe v. Railroad Co., 3 Fed. Rep. 775, is cited by complainants' counsel as holding a doctrine contrary to this, but we think that case is not in point. It was a case where a stockyard had been constructed and used for a number of years as a mutual convenience between the owner and the railroad. The latter then entered into a contract with a rival stockyard company, and agreed to give it a monopoly of the stock business, and required the former stockyard owner to ship through the latter. The railroad had no yards of its own, and it was held that the railroad could not, in this manner, require the complainant to transact his business through a competitor at an increased expense. And a number of authorities are in accord with this holding. Elliott, R. R. § 1551; Stockyards Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. Rep. 461. But we do not consider this case as applicable to the present one. The case of Express Co. v. Koontze, 8 Wall. 342, is also relied on for complainants. That was a shipment of gold dust, and at the time of the shipment one of the two connecting lines was in territory in which a state of war existed, and was dangerous, and the express company had notice of this fact, and was cautioned not to ship over that line. It did so, however, and the freight was seized by a body of armed men. There was a recovery from the express company upon the ground that it was negligent in shipping over a dangerous line, when it should have shipped over a safe one; but the question of the absolute right in the shipper, no sufficient circumstances or reasons appearing to the contrary, to direct how his freight should be carried, was not considered, not necessarily involved. The case of Railroad Co. v. Odil, 96 Tenn. 61, 64, 33 S. W. Rep. 611, is also referred to and relied on by complainants, but that is a case where the railroad company and the shipper had agreed upon a route, and the carrier had deviated from it without the consent of the shipper, and without notice to him, when notice could have been given; and the railroad was held liable for the deviation.

"The case of Rea v. Railroad Co., reported in 7 Interst. Commerce Com. R. pp. 43-54, is in point, and in favor of complainants' contention. In that case the complainant offered the Mobile & Ohio Railroad Company a car load of potatoes at Verona, Miss., and asked that they be forwarded to Cleveland, Ohio, over what is denominated the Big 4 Route, with which the initial railroad company had at the time through billing arrangements and through rates, and which, it appears, was a more expeditious route, but the agent of the railroad company refused to receive and route the shipment in accordance with such directions, and complainant was thereby damaged to the extent of $100. The commission held that the complainant was entitled to have his merchandise carried over the route which he directed, and that the failure to receive and forward the shipment was a discrimination against complainant in violation of the act to regulate commerce, and reparation was ordered. The railroad company attempted to show that this refusal was due to the fact that at the time a strike was in effect on the Big 4 Route, and it could not handle the potatoes; but upon this point the proof was not sufficient to sustain the contention of the railroad. The commissioner cites in support of his ruling two cases: one, MacLoon v. Railroad Co., 5 Interst. Commerce Com. R. 84, 3 Interst. Commerce Com. R. 711, and the other, Pankey v. Railroad Co., 3 Interst. Commerce Com. R. 658, 3 Interst. Commerce Com. R. 33. In the first of these cases the complainant was a shipper of coal, and the railroad refused to switch complainant's cars to his shed unless he would pay demurrage after a certain number of hours—a condition not exacted of other shippers similarly situated; and the only point really decided was that all shippers must be treated alike by the carrier, and no discrimination could be made between them. It is not contended there was any discrimination against complainants in the case at bar as between themselves and other Memphis shippers. In the latter case of Pankey v. Railroad Co., complainant shipped some boxes of books from Troupe, Tex., to Ft. Lawn, S. Car., and directed the shipment to be made "via Vicksburg," and the goods were so billed. It so appeared that this was the cheaper of two routes, but, after giving the bill of lading to them consenting to the shipment by the cheaper route, the books were, by the railroad, sent the other and more expensive route. As reported, this case was merely one of deviation from an agreed route, and stands upon the same basis as the case of Railroad Co. v. Odil, 96 Tenn. 64, 33 S. W. Rep. 611. The report is apparently confused, inasmuch as it states in one part that the goods were billed by the way of Vicksburg, and in another that there

were no shipping directions on the waybill to indicate the route. We gather from these statements that the goods were billed to the shipper to go "via Vicksburg," but this direction was omitted from the waybill to the connecting carriers, and it was upon this ground the initial carrier was held liable for the difference between the charges of the two routes. We think these cases do not support the ruling of the commissioner, and that the report cannot be considered as controlling.

"The main question as to the right of the shipper to route the goods is assumed, rather than considered and decided upon reasons or authority. As a result of the authorities, we are of opinion that when the shipper, by the assent of the carrier, designates the route, that route must be pursued, and a deviation therefrom is at the risk of the carrier. Railroad Co. v. Odil, 96 Tenn. 64, 33 S. W. Rep. 611; Railroad Co. v. Cole, 68 Ga. 623; Railroad Co. v. Day, 20 Ill. 375; Congar v. Railroad Co., 17 Wis. 477; Railroad Co. v. Thomas, 89 Ala. 294, 7 South. Rep. 762; Johnson v. Railroad Co., 33 N. Y. 610; Hutch. Carr. §§ 14, 112, 314; Redf. Carr. § 34. When no special instructions are given and assented to as to routes, the initial carrier may select the route or use that commonly employed by it to the point of destination named, and the absence of special instructions given and acceded to amounts to an assent that the carrier's usual course of business may be followed, and it may designate the route as its convenience may suggest. Snow v. Railroad Co., 109 Ind. 425, 9 N. E. Rep. 702; Frank v. Railroad Co., 52 Miss. 570; Railway Co. v. Duncan, 40 Kan. 503, 20 Pac. Rep. 195; Hostetter v. Railroad Co. (Pa. Sup.), 11 Atl. Rep. 609; Le Sage v. Railway Co., 1 Daly, 306; Ray, Neg. Imp. Duties (Freight Carr.), §§ 97, 318, 393, 668, 669."

MISREPRESENTATION OF FACTS CONTAINED IN RECORDS.

The effect of misrepresentation of facts contained in records has been but little considered and discussed, and its discussion may prove both interesting and beneficial to the profession. The law requires that certain instruments be recorded within a given time after execution and delivery, and this record is constructive notice to the world of its contents. It may be stated to be the law, generally, that where fraudulent representations of a fact contained in a record are made, that the record is not constructive notice to the party to whom such representations are made. It might seem plausible to say that where the truth of any representation could be ascertained by reference to records, at all times accessible to the party in interest, that he would be bound by notice of the contents of the records, and could not be heard to complain of any misrepresentation of any fact contained therein, because he had no right to rely upon any representation made to him where records are at all times open to his inspection; but this does not seem to be the rule as laid down by our modern authorities, which hold that a person to whom positive representations are made has a right to rely and act upon such representations, even though records are accessible and at all times open to his inspection. In Indiana it is held,[1] that "persons are bound in the absence of fraud to take notice of the facts exhibited in a public record." In the same State it is also held[2] that "a false representation made for a fraudulent purpose may be relied upon by the person to whom it is made, although the representation is of a fact contained in a public record." In the latter case,[3] Firestone, the purchaser of chattels owned by Werner, was in the recorder's office making an examination of the records to see if the property was incumbered, when Werner, the owner of the chattels, who had executed a mortgage upon them to another, entered.

His name was Jefferson *Werner*, but it was pronounced *Warner* by himself and others also. The purchaser, Firestone, found a mortgage on the property executed in the name of Jefferson *Werner*, and said, in his presence and hearing, that said mortgage could not have been executed by him, because it was not in his name. He did not contradict the statement, nor disclose his real name. Afterward, on the same day, he stated to the purchaser that the mortgage found had not been executed by him, and that he had no knowledge of any mortgage on the chattels. In reliance upon his acts and statements the purchase was made, and subsequently the purchaser was compelled to pay off the mortgage to prevent a foreclosure. Held, that the owner was guilty of a fraudulent misrepresentation, and that a complaint stating the facts substantially as above was sufficient. A

[1] Taylor v. Morgan, 86 Ind. 295; Ritter v. Cost, 99 Ind. 80; Caley v. Morgan, 114 Ind. 350; Backer v. Pyne, 130 Ind. 288.

[2] Dodge v. Pope, 93 Ind. 480; West v. Wright, 98 Ind. 335; Fisher v. Fuller, 122 Ind. 31; Backer v. Pyne, 130 Ind. 288; Firestone v. Werner, 1 App. (Ind.) 293.

[3] Firestone v. Werner, 1 App. (Ind.) 293.

well known text-writer has said:[4] "Yet another case is that the plaintiff has at hand the means of testing the defendant's statement, indicated by the defendant himself, or otherwise within the plaintiff's power, and either does not use them, or uses them in a partial and imperfect manner.

Here it seems plausible to contend that a man who does not use obvious means of verifying the representations made to him does not deserve to be compensated for any loss he may incur by relying on them without inquiry. But, the ground of this kind of redress is not the merit of the plaintiff, but the demerit of the defendant, and it is now settled law that one who chooses to make positive assertions without warrant shall not excuse himself by saying that the other party need not have relied upon them. He must show that his representation was not in fact relied upon. In the same spirit it is now understood that the defense of contributory negligence does not mean that the plaintiff is to be punished for his want of caution, but that an act or default of his own, and not the negligence of the defendant.

If the seller of a business fraudulently overstates the amount of business, and returns and thereby obtains an excessive price, he is liable to an action for deceit at the suit of the buyer, although the books were accessible to the buyer before the sale was concluded. And the same principle applies as long as the party substantially puts his trust in the representation made to him, even if he does use some observation of his own.

A cursory view of a house asserted by the vendor to be in good repair does not preclude the purchaser from complaining of substantial defects in repair, which he afterwards discovers. The purchaser is induced to make a less accurate examination by the representation, which he had a right to believe. The buyer of a business is not deprived of redress for misrepresentation of the amount of profits, because he has seen or held in his hand a bundle of papers alleged to contain the entries showing those profits. An original shareholder in a company who was induced to apply for his shares by exaggerated and untrue statements in the prospectus is not less entitled to relief, because the facts negativing those statements are disclosed by documents referred to in the prospectus, which he might have seen by applying at the company's office.

In short, nothing will excuse a culpable misrepresentation short of proof that it was not relied on, either because the other party knew the truth, or because he relied wholly on his own investigation, or because the alleged fact did not influence his action at all. And the burden of this proof is on the person who has been proved guilty of material misrepresentation.

He may prove any of these things if he can. It is not an absolute proposition of law that one who, having a certain allegation before him, acts as belief in that allegation would naturally induce a man to act, is deemed to have acted on the faith of that allegation. It is an inference of fact, and may be excluded by contrary proof. But the inference is often irresistible." In Missouri it has been held[5] that "the proposition has now become very widely accepted at law, as well as in equity, at least as a general doctrine, that a man may act upon positive representation of fact, notwithstanding the fact that the means of knowledge were especially open to him. If the representations were of a character to induce action, and did induce it, that is enough. In a New York case,[6] the court, speaking through Porter, J., went so far as to say "every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual engagement, and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith." This may be stated to be the doctrine of a large number, if not all, of our States.[7]

[4] Webb's Pollock on Torts, 377, 378, 379.

[5] Cottrell v. Crum, 100 Mo. 397, 13 S. W. Rep. 753.

[6] Mead v. Bunn, 32 N. Y. 279.

[7] See Eaton v. Winnie, 20 Mich. 156; Dunn v. White, 68 Mo. 181; Duff v. Williams, 85 Pa. St. 490; Litchfield v. Hutchinson, 117 Mass. 195; Bird v. Kiemer, 41 Wis. 134; Catzhausen v. Simon, 47 Wis. 103; Wheelden v. Lowell, 50 Me. 499; Lockridge v. Foster, 5 Ill. 56; Parham v. Randolph, 4 How. (Miss.) 435; Wharf v. Roberts, 88 Ill. 426; Taylor v. Lith, 26 Ohio St. 428; Penn. R. Co. v. Ozier, 35 Pa. St. 72; Ernst v. Hudson River R. Co., 35 N. Y. 28; Gordon v. Grand St. R. Co., 40 Barb. 550; Olson v. Orton, 28 Minn. 36; Caldwell v. Henry, 76 Mo. 254; Stewart v. Stearns, 63 N. H. 99; McGibbons v. Wilder, 78 Iowa, 531.

In a North Carolina case,[8] where plaintiff brought an action for fraudulent misrepresentations in the sale to him of certain shares of corporate stock, a written agreement of the parties was put in evidence, reciting that 50 per cent. of the par value had been paid in cash, and 25 per cent. by a declaration of dividend of net profits, and setting out the illegal financial condition of the company, and providing that the trade was to be conditional upon the representations as to the condition of the business and stock of said company, which might be verified by an expert bookkeeper of plaintiff's selection and at his expense. It was held that plaintiff's right to recover upon such representations, as fraudulent, is not concluded by his failure to waive himself of the right to make such examination through an expert.

It may be regarded as well settled law that the doctrine of *caveat emptor* has no application in cases of fraud, nor where the vendor makes a positive warranty as to title or quality of the article sold. It has been held[9] that "the maxim, *caveat emptor*, is a rule of the common law, applicable to contracts of purchase of both real and personal property, and is adhered to both in courts of law and courts of equity. Where there is no cases of positive fraud a different rule applies. The law presumes that men will act honestly in their business transactions, and the maxim of *vigilantibus non doemientibus jura subvenient* only requires persons to use reasonable diligence to guard against fraud—such diligence as prudent men generally exercise under similar circumstances. But the rules of law do not require a prudent man to deal with every one as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to the contract. There must be a reasonable reliance upon the integrity of men, or the transactions of business, trade and commerce could not be conducted with that facility and confidence which are essential to successful enterprise, and the advancement of individual and national wealth and prosperity. If representations are made by one party to a trade, which may be reasonably relied upon by the other party, and they constitute a material inducement to the contract—and such representations are false within the knowledge of the party making them, and they cause loss and damage to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief in any court of justice."

In Wisconsin it is held[10] that "it is as much an actionable fraud willfully to deceive a credulous person with an improbable falsehood as it is to deceive a cautious, sagacious person with a plausible one. The law draws no line between the two falsehoods." And so it is held[11] that "the law takes note of the ignorant, the credulous, and the unwary, and will make their ignorance and want of cunning their innocence and protect them."

CHAS. W. MCKINNEY.

Evansville, Ind.

[8] Blacknell v. Rowland, 108 N. Car. 556, 13 S. E. Rep. 191. See Taylor v. Saurman, 110 Pa. St. 3, 1 Atl. Rep. 40, where substantially the same doctrine is laid down.

[9] Walsh v. Hall, 66 N. Car. 237. See Oswald v. McGehee, 28 Miss. 340; Fields v. Rouse, 3 Jones L. 72.

[10] Barndt v. Frederick, 78 Wis. 1, 47 N. W. Rep. 9.

[11] Pearl v. Walter, 80 Mich. 322, citing McNamara v. Gargett, 68 Mich. 454; Davis v. Seeley, 71 *Id.* 209, and followed in Leland v. Goodfellow, 84 Mich. 357, 47 N. W. Rep. 591. See Ingalls v. Miller, 121 Ind. 188, 22 N. E. Rep. 995.

CORPORATIONS — SALE OF UNPROFITABLE BUSINESS—INJUNCTION.

PHILLIPS v. PROVIDENCE STEAM ENGINE CO.

Supreme Court of Rhode Island, May 11, 1899.

Where a sale of a corporation's business is necessary because no longer profitable, a private sale, agreed to by a majority of the stockholders, will not be enjoined at the suit of a minority stockholder because he considers the price inadequate, where there is no claim of unfairness, oppression, or fraud, and nothing to show that more could be expected from an auction sale.

STINESS, J.: The complainant, a stockholder, seeks to restrain the respondent corporation from disposing of its property. The company is doing business under an extension by its creditors, in the terms of which an installment becomes due in November next. It is agreed that this cannot be met, and that the company will be unable to go on in business, because the creditors refuse a further extension. In view of these facts, an arrangement has been made to form a new company, in which creditors holding extension notes will take preferred stock to the extent of one-half of their claims, while other subscribers will furnish enough cash to pay for the plant and provide

a working capital. The terms of the proposed sale give to the present stockholders $70,000 over and above the indebtedness of the company, amounting to about $228,000, making a total payment of about $298,000. The estimates of the value of the property vary from $327,000 to $397,000—the latter being the complainant's estimate—but it does not appear that either party has reason to expect that either sum would be realized at a forced sale. This is not a sale in which the other stockholders are to gain any advantage, beyond the privilege, which is also offered to the complainant, of taking his proportionate amount of cash or its equivalent stock in the new company, as he may prefer. It is, in effect, a cash sale to strangers, approved by stockholders representing 3,675 shares against 75 held by the complainant. While this majority cannot affect any rights to which he is entitled, it tends to show a fair price. It is a well-known result, to which courts of justice cannot be blind, that large plants of this kind are often, if not usually, sold at a great sacrifice in case of a forced sale. We should not have to go outside of the records of our own court to find proof of this fact. A sale being necessary, the question is, how shall it be made? The prayer of the bill is that a receiver may be appointed, that the business may be wound up and the company dissolved; and the argument is that the sale of the effects should be at public auction. The question, then, is whether the complainant is entitled to such a decree.

There is a difference of opinion as to the power of a corporation to sell its entire property, and thus practically to retire from business. Some courts hold that it may be done by the consent of all the stockholders (7 Am. & Eng. Enc. Law [2d Ed.], p. 734, note 1), and others hold that it may be done by a majority. *Id.*, notes 2-4. All of the authorities cited in note 1, however, do not hold that the consent of all the stockholders is necessary; *e. g.*, Treadwell v. Manufacturing Co., 7 Gray, 393; Wilson v. Miers, 100 E. C. L. 348, and others. But the editor adds: "There seems to be no doubt that it may do so when it is no longer able to profitably continue its business." We think that this is the correct rule. It has been recognized in this State. Hodges v. Screw Co., 1 R. I. 312, 350. In Wilson v. Proprietors, 9 R. I. 590, Brayton, C. J., said: "No case has been cited, and, in view of the diligence of counsel in this case, we may say there is no case which holds that where the purpose of the incorporation could not be accomplished, the business contemplated could not be carried on—where the capital had been exhausted in endeavors to go on, having no means to go further—a company thus laboring under burdens which they could no longer bear could not release themselves by a surrender of their franchise to the State which granted and which was willing to receive it, and that by a majority. This is not only for their benefit, but it is a necessity, and it would be hard indeed if one stockholder could by his dissent prevent such relief against the prayer of all other members of the company." In Peabody v. Waterworks, 20 R. I. ——, 37 Atl. Rep. 807, a necessary limitation to this rule was recognized, in the words: "The action of the company was taken by a vote of more than 1,100 out of a total of 1,350 shares. There is no proof of unfairness, oppression, or fraud in such action. The case, as presented, is simply that of a stockholder who differs from a large majority of his fellow-stockholders as to the expediency of a sale." The principle upon which these cases rest is that a corporation may dispose of its property, by a majority vote, in cases which are free from unfairness, oppression, and fraud. Against wrongs of this kind equity will interfere. To this effect are Lauman v. Railroad Co., 30 Pa. St. 42; Treadwell v. Manufacturing Co., 7 Gray, 393; Leathers v. Janney, 41 La. Ann. 1120, 6 South. Rep. 884; Sewell v. Beach Co., 50 N. J. Eq. 717, 25 Atl. Rep. 929; Sargent v. Webster, 13 Metc. (Mass.) 497; Warfield v. Canning Co., 72 Iowa, 666, 34 N. W. Rep. 467; Wilson v. Miers, 100 E. C. L. 348. See also Ditch Co. v. Zellerbach, 37 Cal. 543. The complainant does not charge improper conduct, but simply that he considers the price inadequate and unjust, and hence he prays for a receiver, and a sale of the property by auction. Ordinarily, when a court orders a sale, it can only be done by auction. A court cannot negotiate a private sale, and it orders an auction, as the fairest chance for all parties to bid and buy. But when the parties in interest have negotiated a sale which is fair to all concerned, and there is nothing to show that a larger price may reasonably be expected, it does not follow that an auction sale would be ordered. This question was considered in Quidnick Co. v. Chafee, 13 R. I. 402, in which the trustee had an offer for the entire property, approved by nearly all the creditors. Then other parties intervened, agreeing to bid the amount named at auction, and the court ordered a sale by auction. In the present case there is no evidence that anybody is willing to give as much as the offer proposed, or that there is any reason to suppose that it will bring as much or more. The only testimony put in by the complainant is that the tools will probably bring more than they are valued at by the company, while, as to the bulk of the property—the real estate, etc.—there is no evidence of market value. Moreover, the complainant does not show that he desires to bid upon the property himself, or that he knows of anyone who would bid at a sale. In this absence of evidence that a larger total might be expected from an auction sale, we see no reason to disturb the agreement already made, which, upon the testimony given, seems to be fair. The complainant relies strongly on Mason v. Mining Co., 133 U. S. 50, 10 Sup. Ct. Rep. 224. In that case the court had appointed a master to value the property, which he reported to be nearly $500,000. A majority of the company had arranged a sale to themselves at $50,000. Naturally, in view of such gross inadequacy, the

court ordered a sale by auction. The case was very different in its details from the case before us. In Wilson v. Proprietors, 9 R. I. 590, the city of Providence had control of the corporation, and had sold the corporate property to itself. The court restrained the city from taking possession, and ordered a sale by auction. That, too, was a different case from this one. The court is bound to look to the interests of all parties, and especially to protect the rights of a minority from oppression and fraud. But where, as in this case, no such thing is charged, and nothing is shown to lead to the belief of a better total price, the complainant makes no case for interference. To show that movable tools may be sold at a price somewhat, but not largely, higher than that at which they are scheduled, is quite a different thing from showing that the plant as a whole would sell for more than the price offered. To set aside the sale under these circumstances would be to risk a certainty for an uncertainty, without any testimony on which to base a hope of benefit to the stockholders from such interference. We see no reason for such a step in the dark. Bill dismissed.

NOTE.—*Generally.*—Where the corporation is an unprofitable and failing enterprise, a sale of all the corporate property may be made with a view to dissolution. Price v. Holcomb, 89 Iowa, 123 (1893); Hayden v. Official Hotel Red-Book & Directory Co., 42 Fed. Rep. 875; Treadwell v. Manufacturing Co., 7 Gray, 393; Wilson v. Proprietors, 9 R. I. 590. This doctrine is recognized in Sawyer v. Dubuque Printing Co, 77 Iowa, 242; Doyle v. Leitelt, 97 Mich. 298 (1893); Lauman v. Lebanon Valley Ry. Co., 30 Pa. St. 42. In Sewell v. East, etc. Co., 50 N. J. Eq. 717 (1893), it was held that where a large majority of the stockholders are in favor of the sale, and the proceeds thereof will go into the treasury to continue business, a dissenting stockholder cannot enjoin the corporation from selling all its property, where its debts are large and a mortgage is about to be foreclosed, and a sale is the only means of protecting the company.

This Right Must be Exercised in Good Faith —The majority must not exercise this right in a manner inconsistent with good faith toward the minority stockholders; and if it is exercised oppressively and they purchase the property of the corporation for themselves at an inadequate price, the transaction will not be permitted to stand. Ervin v. Navigation Co., 23 Blatchf. 517, 27 Fed. Rep. 625.

May Lease Entire Business.—In Bartholomew v. Derby Ry. Co., 38 Atl. Rep. 45 (Conn., 1897), it was held that, by a vote of the board of directors and a majority of the stockholders, one rubber manufacturing company may lease its entire business to another company, where the financial condition of the leasing company is depressed and its business unprofitable for want of capital, the lease being the best, if not the only, means of preventing insolvency, and there being no fraud in the case.

Cancellation of Lease.—The consent of stockholders necessary to authorize a lease is also required for the cancellation of said lease. Henry v. Pittsburg, etc. Ry. Co., 2 Ohio N. P. 118.

Management of the Majority of the Stockholders.—A court of equity will not interfere with the management of the majority of the stockholders of a corporation, at the instance of the minority, unless such interference is absolutely necessary to the attainment of justice and for the prevention of fraud. Peatman v. Centerville Light H. & P. Co., 100 Iowa, 245, 6 Am. & Eng. Corp. Cas. (N. S.) 77. See also Proctor Coal Co. v. Finley, 98 Ky. 405, 3 Am. & Eng. Corp. Cas. (N. S.) 416. For an example where equity will relieve minority stockholders from the action of a majority stockholder, see De Neufville v. New York, etc. Ry. Co., 81 Fed. Rep. 10, 51 U. S. App. 374.

W. S. HANCOCK.

JETSAM AND FLOTSAM.

CONTRIBUTORY NEGLIGENCE IN DRINKING IMPURE WATER.

The liability of a water company for supplying impure water for domestic use, thereby communicating typhoid fever to a consumer and causing his death, is denied in the recent case of Greene v. Ashland Water Co. (Wis.), 43 L. R. A. 117, on the ground of the consumer's contributory negligence in drinking the water when he knew, or had reasonable means of knowledge, that it was dangerously polluted with sewage. As to his knowledge of this the court says the proof is overwhelming that the water was dangerously polluted at the time he was stricken with the fever, and had been in that condition—especially in the spring—for several years, and that the facts in that regard were understood in the city generally, and had been the subject of discussion at public meetings in the city council and in the newspapers and among the people for a long time. Because of his contributory negligence the court denies any right of action against the water company for damages, whether based on negligence or deceit.

The victim in this case is described by the court as "an intelligent, reading workingman," and his counsel contended that it was demanding too much of a man in his walk in life to hold, as matter of law, that he should have been on his guard against the water which the entire community were drinking, and have been required to dig a well, drive a pump or buy spring water instead of taking water from that with which the city was supplied. It was not found by the jury that he actually knew that the water was dangerous to health, but it was found to have been publicly and widely stated and believed, and indeed generally accepted as true by the people, that typhoid fever epidemics in the city were attributable to the water. This was deemed by the court to be such reasonable ground of believing the water dangerous as to prove the negligence of the man who drank it, notwithstanding the express finding of the jury that he was not in fault.

The rule of contributory negligence doubtless has a proper application in such cases, and this was an extreme case. It is not found what other facilities for obtaining water existed in that place. While it can hardly be supposed that it was impossible to procure any other water, it may have been difficult and expensive to do so. Difficulty and expense of procuring good water would hardly excuse a person for drinking water known to contain typhoid fever germs, but might excuse the drinking of water in which the existence of such germs was merely suspected. What constitutes negligence in such case would be peculiarly a question for the jury in most instances, and there is room for doubt whether it was not so in this case.

THE "ONE HOSS SHAY" CITED AS AUTHORITY.

The literary world will be surprised to learn that Oliver Wendell Holmes' famous poem, "The Wonderful One Hoss Shay," has not only been cited as an authority by the attorney for the plaintiffs in a suit which recently came before the Superior Court of Montana, but has also been quoted with approval by that august body in its written opinion. Probably no other humorous poem has enjoyed greater popularity than this one. It is part of the earliest recollections of our school days, and its lines never fail to excite the admiration and amusement of our mature years. Its jovial author might well have hoped that this child of his wit and genius would be given a place among the American classics, but even his lively imagination could hardly have pictured it as being weaved into the literature of the law. Undoubtedly it is the first poem to enjoy this distinction, for never before, in the entire history of jurisprudence, so far as we can learn, has a court of final resort thrown off the somber dignity and cold reserve which proverbially surround such tribunals and indulged in facetiousness and quoted poetry to the discomfiture of the plaintiff's attorney and the reversal of the lower court. The case did not arise over a vehicle, as might be supposed, but involved the privilege of one mine owner to condemn the right of way for a flume over the property of another. The Montana statute provides that the plaintiff must allege in his petition that he has endeavored in good faith to purchase this right of way from the defendant, and that the defendant has refused to accept any reasonable sum therefor. The plaintiffs in this case failed to state that they had done anything more than to make the most indefinite kind of an offer to the defendant. The lower court held the plaintiff's allegation to be a sufficient compliance with the statute, and on the trial found in the plaintiff's favor. But the supreme court, after an exhaustive and learned discussion of the law of condemnation, reversed the lower court's judgment on account of the insufficiency of the plaintiff's petition, and concluding, says:

"Plaintiffs, in their brief, humorously allege that, if they are allowed to build the flume, they will make it secure, 'and, like the deacon's shay, they will make it strongest in the weakest point.' It is not the plaintiffs' flume, though, that this court thinks should be made strongest in its weakest point, but the proceedings by which they alone can obtain the right to build the flume. However, as far as they have gone, their case is truly like the deacon's shay—it has collapsed entirely—and, like the deacon, they are on the rock, for they are out of court.

"'End of the wonderful one-hoss shay,
Logic is logic, that's all I say.'

"Judgment reversed."—*Albany Law Journal.*

CORRESPONDENCE.

THE WAR STAMP ON INSTRUMENTS OF EVIDENCE.

To the Editor of the Central Law Journal:

The question as to the effect upon instruments offered in evidence in State courts of the failure to affix the stamp required by the war revenue law, discussed in your editorial of August 25, arose in this State in the case of People *ex rel.* Consumer's Brewing Co. v. Fromme, Register, etc., 35 App. Div. 459, decided by the Appellate Division of the Supreme Court, First Department, December Term, 1898. Following Moore v. Moore, 47 N. Y. 467, decided under the Act of 1862, it was held that congress could not prescribe rules of evidence for State courts. The direct question in the case was as to the right of the register to refuse to record deeds, etc., not having the necessary internal revenue stamp affixed.

Ithaca, N. Y. CUTHBERT W. POUND.

A QUESTION OF PARLIAMENTARY LAW.

To the Editor of the Central Law Journal:

In the CENTRAL LAW JOURNAL of March 17, 1899, Vol. 48, No. 11, p. 219, I find the following signed "Lex:" "A bill passed the house in which it originated, and was amended in the other house. Upon its return to the first house a motion to non-concur was lost. The presiding officer decided that the amendment was thereby concurred in, and the minutes recite that the amendments were concurred in. Is the defeat of a motion to non-concur equivalent to a concurrence? Kindly cite authorities." Is this a question which depends upon the standing rules of the legislative body in which the question arose? The first impulse is that the decision of the presiding officer as stated is correct. But is it? Referring for a moment to Jefferson's Manual and to the Rules and Practice of the House of Representatives (Constitution Manual and Digest; Rules and Practice House of Representative, 1st Session, 51st Congress, p. 342), their standing rule is stated: "The question which first arises on a resolution, amendment or conference report is on concurrence. And as the negative of concurrence amounts to the affirmative of non-concurrence, no question is afterward put on the latter motion." There appears to be no standing rule that the negative of non-concurrence is the affirmative of concurrence. In order to illustrate, motion to concur; ayes, 100; noes, 100. In a body like the house of representatives, where the presiding officer is a member and has a vote and has already voted, "in all cases of a tie vote the question shall be lost." Page 238, rules cited. Thus amendment is lost. The bill then would be returned to the house originating the amendment. Page 174, rules cited. To return to case stated in question, motion to non-concur; ayes, 100; noes, 100. Is the bill as amended concurred in? The standing rule heretofore quoted (page 342, rules cited), is that the question which first arises on an amendment or conference report is on concurrence. In the discussion of partial agreements to conference reports, I find (page 346, rules cited), "in such cases the senate amendments undisposed of are before the house for consideration. Usually motions are made either to concur with an amendment, to concur, to non-concur and ask a further conference, or to non-concur and have precedence in the order above stated." Therefore, the motion to non-concur having been lost by the tie vote or negative vote, would not a motion to concur with an amendment be in order? In other words, may it not have been the desire of the legislative body to defeat the motion to non-concur because it wished to concur with the amendment with an amendment? Would such action be proper? "They may modify an amendment from the other house by ingrafting an amendment on it, because they have never assented to it; but they cannot amend their own amendment, because they have, on the question, passed it in that form. 9 Grey, 363; 10 Grey, 240. In senate, March 29, 1798." Pages 174 and 175, rules cited. There is another consideration involved in treating the question asked by "Lex" upon the theory of a tie vote, which is, that if the speaker's ruling was correct the amendment in such a case would be passed without a majority in its favor. This seems inconsistent with

any correct theory of law or parliamentary law. In other words, in case of a tie the friends of the amendment are not in a majority, and it does not seem that it can be carried by stating the question negatively. The questions are not perfectly equivalent. "Where questions are perfectly equivalent, so that the negative of the one amounts to the affirmative of the other, and leaves no other alternative, the decision of the one concludes necessarily the other. 4 Grey, 157." Page 163, rules cited. In the case of a law thus passed—the minutes constituting, with the facts stated, a part of the legislative journal—would there be any relief? Would the purported law be a valid enactment? Would such a ruling by the presiding officer, in respect to the passage of the law, be a mere question whether said house had complied strictly with its own rules intermediate its introduction and final passage, or what manner of question would it be? In McDonald v. State, 80 Wis. 407, 411, the court said: "The validity of chapter 488 is challenged on two general grounds. These are: (1) That the two houses of the legislature, in attempting to enact that chapter, violated their own rules of procedure in several particulars; and (2) that the yeas and nays were not called on the passage of the bill and entered on the journals of the respective houses." The first objection in that case is pertinent upon the question here. When the presiding officer decided that the amendment was concurred in by the losing of the motion to non-concur, a member could have appealed from the decision of the chair. In the case of the tie vote stated, the speaker must have voted against the motion to non-concur. Upon the appeal from his construction of the vote, he, doubtless, would not vote, and the decision would be 99 for sustaining the decision of the chair, and 100 against sustaining the decision of the chair. Thus, his construction would be lost and the amendment would not be concurred in; or he must have gone to the greatest extreme and voted to sustain his own ruling, which would enable him to enact a law which was not favored by a majority. In the Wisconsin case (McDonald v. State, 80 Wis. 407, 411, 412), the court declared: "The courts will take judicial notice of the statute laws of the State, and to this end they will take like notice of the contents of the journals of the two houses of the legislature far enough to determine whether an act published as a law was actually passed by the respective houses in accordance with constitutional requirements. Further than this the courts will not go. When it appears that an act was so passed, no inquiry will be permitted to ascertain whether the two houses have or have not complied strictly with their own rules in their procedure upon the bill, intermediate its introduction and final passage. The presumption is conclusive that they have done so. We think no court has ever declared an act of the legislature void for non-compliance with the rules of procedure made by itself, or the respective branches thereof, and which it or they may change or suspend at will. If there are any such adjudications, we decline to follow them."

Milwaukee, Wis. RUBLEE A. COLE.

BOOK REVIEWS.

GREENLEAF ON EVIDENCE, VOLUME 1, SIXTEENTH EDITION.

Revised, enlarged and annotated, by John Henry Wigmore, Professor of the Law of Evidence in the Law School of Northwestern University of Chicago. No American law book has so long and favorably held its place with the bar as Greenleaf on Evidence. No other law text-book has probably found its place to the shelves of so many practicing lawyers. First published in 1842. During these fifty-seven years it has passed through fifteen editions, the first seven of which were prepared entirely by the author's own hand, the author having died in 1853. The eminent Isaac F. Redfield, Chief Justice of the Supreme Court of Vermont, appeared as the reviser and editor in 1866. In 1876 an edition appeared, edited by John Wilder May, and in 1883 an edition by the author's grandson, Greenleaf Croswell, but in none of the editions, up to this date, was the text materially changed, but in the present edition much has been added to and subtracted from the text by Professor Wigmore, added to when necessitated by broad statutory changes, the development of many doctrines and new applications of established principles, and substracted when rendered absolete by statutory abolitions. Additions to the text are indicated by brackets when made by the present editor, who, however, states in his preface that he does not assume any responsibility in regard to matter added to the text by other editors, which matter is indicated in the text by braces. The present editor has also added three entire chapters, IV., V. and XI., and he states over 100 new sections, besides additions to original sections. The author has added to all recent citations of authorities reference to the National Reporter System up to December 31, 1898, which will be of great advantage to subscribers to that system of reports. We are not advised by the publishers when volumes two and three will appear. Volume one contains over 1,100 pages. The general quality and appearance of this volume is up to the high standard of its publishers, Little, Brown & Co., Boston.

RODGERS ON DOMESTIC RELATIONS.

The author of this treatise is a new one in the field of text-book writers. When a new author devotes the necessary labor to the work in hand, and possesses the natural qualifications for authorship, he often excels those of longer experience. He of long experience in any channel of labor oftentimes becomes careless and inattentive, but the new worker, starting in a new field, seldom commits the error of inattention. It has been our good fortune to know much of Mr. Rodgers for the past ten years. He is a careful, laborious, painstaking lawyer, who throws all his energy honestly into the work in hand, whether managing a case in a trial court, or preparing a brief and arguing it before the supreme court. Mr. Rodgers has written many leading articles for the CENTRAL LAW JOURNAL and *American Law Review*. Among the former we would mention: "Movable and Immovable Fixtures," 46 Cent. L. J. 282; "Effect on the Exemption Rights of the Encroachment of a Town or City upon a Rural Homestead," 47 Cent. L. J. 72; "Rights of National Banks to Charge Usury," 47 Cent. L. J. 196. The field which Mr. Rodgers has chosen for his initial text-book is one that has been heretofore covered by eminent writers—Joel Prentiss Bishop, Schouler, Ewell, etc. Mr. Rodgers' ability to condense must be immense, for in comparing his Domestic Relations with the treatises of the other authors referred to, it is difficult to discover what he has left out of his one volume book which can be found in other works, most of which only cover a portion of the subject of Domestic Relations, though in some instances occupying two volumes. Mr. Rodgers embraces in his book Marriage, Husband and Wife, Community Property,

Curtesy, Dower, Parent and Child, Custody of Children, Bastards, Infants, Master and Servant, Guardian and Ward. If he has omitted anything necessary to be said on these subjects, we fail to discover the omissions. The author has been particularly lucid, as well as entertaining, in his description of the relations between husband and wife, which relations, especially relating to separate property of each, have been so much changed in all the States by legislative enactments. 4,500 cases are cited. The volume contains 1,033 pages. The author says, in his preface, that the book has been prepared with a view to practical utility and reliability, and to state the propositions of law with correctness, and, as he aptly puts it, "reflecting the living law," and he says every line has been written with his own hand. We commend this book to the profession. Published by T. H. Flood & Co., Chicago.

BOOKS RECEIVED.

The Law of Private Companies, Relating to Business Corporations Organized under the General Corporation Laws of the State of Delaware, with Notes, Annotations and Corporation Forms. By J. Ernest Smith, Counsellor-at law. Philadelphia: T. & J. W. Johnson & Co., 1899. pp. 284. Paper, $1.50; Cloth, $2.00.

HUMORS OF THE LAW.

"Where did the dog bite the plaintiff?"

"Just outside the planing mill."

"I asked you, sir, where the dog bit—b-i t—the plaintiff?"

"Oh! In the small of the back."

"Well, why didn't you say so in the first place?"

"I did say so."

"You claim you said 'small of the back' in the first place?"

"No, I said lumbar region."—*Cleveland Plain Dealer.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ADMINISTRATION—Accounting—Debt from Self.—Though an administrator should be charged with a debt from himself to the estate, existing before his appointment, as money on hand, yet he never, while administrator, having had the means to pay any part of it, the decree settling his accounts should show this, that he may not be charged with contempt for not paying it over as directed.—IN RE WALKER'S ESTATE, Cal., 57 Pac. Rep. 991.

2. ASSIGNEE FOR BENEFIT OF CREDITORS—Removal.—Where one is, by a single decree, appointed assignee for the benefit of creditors for the assigned estate of a partnership, and for the assigned estates of the members thereof, and the estates are so mingled and interwoven that it would be scarcely possible to treat them separately, he may, on petition by a creditor of the partners only for his removal as assignee of such partners, be removed as individual assignee.—IN RE AHL'S ESTATE, Penn., 43 Atl. Rep. 956.

3. ASSIGNMENT FOR BENEFIT OF CREDITORS—Preferences—Taxes.—Where personal property included in an assignment for the benefit of creditors is incumbered by a mortgage made by the assignor, within two months next prior to the assignment, to create a preference or secure a pre-existing debt, taxes on the property charged against the assignor at the time of the assignment are entitled to priority, on the distribution of the proceeds of the property by the assignee, over the claim of such mortgage.—ADAIR V. BLACKBURN, Ohio, 54 N. E. Rep. 515.

4. ASSIGNMENTS FOR CREDITORS—Trustee.—Where a creditor, who has sued to set aside a conveyance as fraudulent, is paid his claim, but is required to give a refunding bond to await final decision, he still has an interest as creditor entitling him to stand as equitable plaintiff in an action on the bond of a trustee under a deed of assignment executed by the debtor.—GERMAN BANK V. HALLER, Tenn., 52 S. W. Rep. 288.

5. ASSOCIATIONS—Exchange—Contracts of Members.—A cotton transaction, under the rules of the New Orleans Cotton Exchange, between parties who are members of same, is governed by the provisions thereof; and by an agreement of contracting parties they become an incident of such transaction, and modify the principles of law applicable thereto.—PATON V. NEWMAN, La., 26 South. Rep. 576.

6. ATTACHMENT—Grounds—Dissolution.—An attachment having been obtained on the sole ground that the defendant had caused a reputed act of mortgage in favor of his wife to be recorded against his property, with intent to defraud his creditors, and an averment to that effect in the plaintiff's petition having been withdrawn on proof of its validity being offered, the same must, as a necessity, be dissolved.—KOENIG V. HUCK, La., 26 South. Rep. 543.

7. ATTACHMENT—Grounds—Fraud.—The fact that one induces another to give him credit by promising to give security at a future day, and that he fails to keep the promise, does not show that the debt was fraudulently contracted, so as to justify an attachment.—JOHNSON V. STOCKHAM, Md., 43 Atl. Rep. 920.

8. ATTORNEY—Disbarment—Conviction of Crime.—That an attorney convicted of the crime of unlawfully using the United States mails paid the fine imposed is no defense to disbarment proceedings brought against

him for the same offense.—PEOPLE v. WEBER, Colo., 57 Pac. Rep. 1079.

9. ATTORNEY'S LIEN—Enforcement.—The lien of an attorney at law on land of his client for fees may be enforced in the same manner as is provided by law for the foreclosure of mortgages on realty. Hence it follows that when a petition for such foreclosure was filed in the superior court during a regular term thereof, and thereafter the defendant acknowledged due and legal service of such proceedings, the court had jurisdiction to render a judgment of foreclosure at its next succeeding term.—RAY v. HIXON, Ga., 33 S. E. Rep. 692.

10. ATTORNEY AND CLIENT—Fees—Evidence.—Defendant and plaintiff, his attorney, agreed that plaintiff should prosecute a suit for defendant, and should receive a reasonable fee out of the proceeds; plaintiff agreeing to look to the proceeds alone for the fee. Defendant, on receiving the proceeds, refused to pay. Held, that plaintiff was not limited to his claim on the proceeds of the suit, but could recover a personal judgment against defendant.—HAZELTINE v. BROCKWAY, Colo., 57 Pac. Rep. 1077.

11. BANKRUPTCY—Collection of Assets—Property Under Levy.—Where the liens acquired by a creditor by the recovery of judgment, the filing of a creditors' bill, and the levy of execution by the sheriff, are dissolved by the subsequent bankruptcy of the debtor, the trustee in bankruptcy may recover any property remaining in the hands of the sheriff under the levy, together with the proceeds of such as has been sold under the execution, and any rents collected by the sheriff.—IN RE FELLERATH, U. S. D. C., N. D. (Ohio), 95 Fed. Rep. 121.

12. BANKRUPTCY—Priority of Liens—Labor Claims.—Where a statute of the State (3 How. Ann. St. Mich. §§ 8427a-8427p) creates a lien in favor of employees performing labor in the manufacture of lumber, but provides that the debt or claim shall not remain a lien on the product unless a statement thereof is filed within 30 days, and action begun within 3 months, holders of such liens, perfected according to the statute, against the estate of the employer in bankruptcy, are entitled to payment in full out of the proceeds of the property affected, in preference to claims for labor of the same kind which have not been preserved as the statute directs, although both classes of claims are equally within the description of claims for "wages," as to which the bankruptcy act declares that they shall "have priority and be paid in full out of bankrupt estates."—IN RE KERBY-DENNIS CO., U. S. C. C. of App., Seventh Circuit, 95 Fed. Rep. 116.

13. BILLS AND NOTES—False Representations.—The maker of a negotiable note, given without consideration, and procured by means of fraudulent representations of the payee, is not liable thereon to a purchaser thereof, unless such purchaser is a *bona fide* holder.—BOMAR v. ROSSEE, Ala., 26 South. Rep. 510.

14. BILLS AND NOTES—Release of Joint Maker—Consideration.—An agreement to release one of two makers of a joint promissory note from liability thereon is not binding, unless such agreement is supported by a consideration. The agreement of release which was set up in the present case is shown by the evidence to have been entirely without consideration. Consequently a verdict in favor of the defendant was contrary to law.—FOWLER v. COKER, Ga., 33 S. E. Rep. 661.

15. BROKERS — Right to Commission — Contract.—Plaintiff, a broker, having obtained for defendant a contract with a third person for the exchange of real estate, defendant contracted with plaintiff that, as his commission, he should receive a certain portion of the real estate to be received under the contract and a cash balance; this commission to be paid when "the agreement of exchange is carried into effect." The contract of exchange was never enforced. Held, that the clause, as regards time of payment, did not contemplate a failure to enforce the contract, and that defendant could not, by failing to enforce the contract, avoid paying plaintiff's commission.—ALVORD v. COOK, Mass., 54 N. E. Rep. 499.

16. BUILDING AND LOAN ASSOCIATION.—Where a shareholder in a building and loan association has a right to pay off a loan to him at any time, there is nothing illegal in the officers permitting his paying off a loan carrying a high rate of interest, and taking a new one at a lower rate, if he was successful in bidding for money at a lower rate, though done for the purpose of decreasing the rate of interest.—MAURY COUNTY BUILDING & LOAN ASSN. v. COWLEY, Tenn., 52 S. W. Rep. 312.

17. CARRIERS OF GOODS—Bill of Lading.—The indorsement and delivery of a bill of lading on the discount of a draft drawn by the consignor of the goods represented by the bill of lading, for the purchase price of such goods, operate to pass to the transferee a special title to the goods, as against the consignor and his creditors, defeasible only on acceptance and payment of the draft by the consignee.—AMERICAN NAT. BANK v. HENDERSON, Ala., 26 South. Rep. 498.

18. CHATTEL MORTGAGE—Seizure by Mortgagee before Default.—Where a mortgagee of chattels takes possession of the property before default, and, after the law day of the mortgage, the mortgagor, under an agreement with the mortgagee, discharges the mortgage debt, by the performance of labor and payment of money, the title to the property and right to immediate possession become reinvested in the mortgagor.—FIELDS v. COPELAND, Ala., 26 South. Rep. 491.

19. CONSTITUTIONAL LAW—Life Insurance Policies.—The statute of Missouri (Rev. St. 1889, § 5855), providing that suicide shall not be a defense to any policy of life insurance unless it was contemplated by the insured at the time of his application, is not one relating to the remedy, but enters into the consideration, and becomes a constituent part of every policy of insurance to which it applies; hence such policies are within the provisions of the federal constitution against the impairment of contracts, and cannot be affected by a subsequent repeal of the statute.—JARMAN v. KNIGHTS TEMPLARS' & MASONS' LIFE INDEMNITY CO. OF ILLINOIS, U. S. C. C., W. D. (Mo.), 95 Fed. Rep. 70.

20. CONSTITUTIONAL LAW—Wisconsin Insolvency Law.—The provision of the Wisconsin insolvency law (Laws 1897, ch. 334, § 3) which dissolves an attachment or levy on the property of an insolvent debtor on his making a general assignment within 10 days thereafter is unconstitutional and void as to all debts incurred previous to its taking effect, as taking away the remedy for their collection, although such debts were included in a note executed by the debtor subsequent to the taking effect of the act.—WILSON v. BROCHON, U. S. C. C., W. D. (Wis.), 95 Fed. Rep. 82.

21. CONTRACT—Consideration.—Part payment of an existing indebtedness which is due is not consideration for a new promise. Accordingly, held, that the promise of a creditor to his debtor, which is made at the time of a partial payment by the latter, that he will "take care of" a certain judgment against the latter in favor of a third person, is without consideration, so far as it is dependent upon such payment.—ROBERTS v. FIRST NAT. BANK OF FARGO, N. Dak., 79 N. W. Rep. 998.

22. CONTRACTS OBTAINED BY FRAUD.—The defendants were induced to sign their names to a printed form of contract for the purchase of a book by a fraudulent representation made to one defendant that he was writing his name only to show how it was spelled, and to the other defendant that he was signing his name only as an autograph. Held, that they were not bound, even though they were negligent in failing to ascertain what was printed on the papers which they signed.—ALEXANDER v. BROGLEY, N. J., 43 Atl. Rep. 888.

23. CONTRACT OF INSANE PERSON.—The contract of an insane person, who has never been adjudged insane by any tribunal of competent jurisdiction, is voidable, after his death, at the option of his personal representatives.—BUNN v. POSTELL, Ga., 33 S. E. Rep. 707.

24. CORPORATIONS—Accommodation Paper—Amendment of By-Laws.—It is not competent for the stockholders, by adoption of by-laws or amendments thereto, to enlarge or extend the powers of the corporation beyond the scope authorized by its charter; and if the general by-laws are inconsistent with the object of the corporation, and the spirit and terms of its charter, or attempt to authorize the corporation to perform acts beyond its charter powers, they are void, although adopted with unanimous consent of the stockholders.—STEINER V. STEINER LAND & LUMBER CO., Ala., 26 South. Rep. 494.

25. CORPORATIONS—Contracts—Manner of Doing Business.—Where the business of a corporation has habitually been transacted in an irregular manner, without observing the formalities legally required to bind it, with the knowledge and acquiescence of its stockholders, and it has in such manner made contracts and incurred obligations, the strict rules of law, however well settled, limiting the mode of exercising the powers of corporations by their officers, are not applicable to such contracts as against third parties who have dealt with the corporation in good faith, and with knowledge of its manner of doing business.—G. V. B. MIN. CO. V. FIRST NAT. BANK OF HAILEY, U. S. C. C. of App., Ninth Circuit, 95 Fed. Rep. 23.

26. CORPORATIONS — Illegal Corporations — Suit to Annul.—The State may allege that a corporation has no valid existence, and yet have a standing in court to prove that it should be enjoined and prohibited from continuing the business in which it is engaged.—STATE V. NEW ORLEANS DEBENTURE REDEMPTION CO., La., 26 South. Rep. 586.

27. CRIMINAL EVIDENCE—Homicide—Dying Declarations.—Dying declarations are admissible in homicide cases, but they are restricted to the act of killing, and the circumstances immediately attending the act which form a part of the *res gestæ*. Statements relating to former and distinct transactions, not immediately connected with the killing, cannot be received.—STATE V. O'SHEA, Kan., 57 Pac. Rep. 970.

28. CRIMINAL EVIDENCE — Lottery Slips—Knowledge of Character.—Although the accused at the trial of an indictment against him under the statute, deny his knowledge of the character of the slips or papers found in his possession, yet the fact of his possession may be considered by the jury when the question of knowledge is determining his guilt or innocence, and notwithstanding his denial, the jury may convict the defendant upon circumstantial evidence, if satisfied by it of his guilt beyond a reasonable doubt.—STATE V. COLLINS, N. J., 43 Atl. Rep. 896.

29. CRIMINAL LAW—Assault with Intent to Murder.—In a prosecution for assault with intent to murder, where, under the information and evidence, the defendant could have been convicted of an assault likely to produce great bodily injury, it was error to charge that he could only be convicted of assault with intent to commit murder, or of a simple assault.—PEOPLE V. WATSON, Cal., 57 Pac. Rep. 1071.

30. CRIMINAL PRACTICE — Homicide — Indictment.—Where an offense charged may be committed by two different means, and as several acts connected with and forming part of a general offense may be stated in a single count, its commission by both means may be charged in one count of the information, and proof of any one will sustain the allegation.—STATE V. HEWES, Kan., 57 Pac. Rep. 959.

31. CRIMINAL PRACTICE—Warrant of Arrest.—A warrant issued by an examining magistrate for the arrest of a person charged with felony is sufficient if it designate the crime by name. Technical averments are not required.—IN RE STEWART, Kan., 57 Pac. Rep. 976.

32. CRIMINAL TRIAL—Homicide—Custody and Conduct of Jury.—A verdict of guilty in a capital case will not be set aside because the jury, while out riding, were conveyed into another county, and were permitted by the officer in charge to temporarily leave their carriage, and separate from each other for a short distance, in a woods, when it appeared there was no misconduct or disregard of the officer's authority on their part, and no opportunity for any improper communication with them.—STATE V. MOWRY, R. I., 43 Atl. Rep. 871.

33. DAMAGES—Absence of Pecuniary Loss.—In an action for damages for the death of plaintiff's brother, only nominal damages can be recovered where it does not appear that plaintiff derived, or could reasonably expect to derive, pecuniary benefit from deceased, nor that deceased was accumulating, or was likely to accumulate, any estate, so that plaintiff, as his heir, would suffer pecuniary loss.—BURK V. ARCATA & M. R. R. CO., Cal., 57 Pac. Rep. 1065.

34. DAMAGES—Speculative Damages—False Representations.—Where it appears, in a suit to recover damages for inducing complainant to enter into the lease of a certain lot for the purpose of erecting a restaurant and lodging house thereon by false representations as to its location, with reference to passage by it of visitors going to and returning from the Centennial, that the people did not patronize restaurants and lodging houses in the locality of complainant's establishment, and that such establishments, as a general thing, were failures financially, the damages, assuming the false representations to have been made, are too speculative to justify recovery.—MYERS V. TURNER, Tenn., 52 S. W. Rep. 332.

35. DEED—Cancellation—Fraud.—A deed on exchange of lands will not be set aside on the ground of fraud where the father of complainant went with him to the farm, and carefully examined it, and took a third person with him, who defendants testified was not their agent, and complainant went into possession and continued to work the farm for three years without complaint, and sought to set the exchange aside only when he could not sell it for the amount allowed for it in the trade.—BUXTON V. JONES, Mich., 79 N. W. Rep. 980.

36. DEEDS — Conditions Subsequent — Forfeiture. — Where a deed grants land to a university, and provides that it shall revert to the grantor unless the university uses it for academic and scientific purposes and establishes thereon a botanical garden, the land conveyed vests in the grantee subject to a condition subsequent, which must be fulfilled within a reasonable time.—PIERCE V. BROWN UNIVERSITY, R. I., 43 Atl. Rep. 878.

37. DEED—Estate Conveyed.—A deed of a quarter section of land, which in the granting clause purports to convey to the grantee a fee-simple title, but which in the *habendum* clause reads as follows: "To have and to hold the same during her natural life, and at her death to be divided as follows: Sixty-five acres north of the railroad right of way to Mary K. Blodgett, and the balance to go to James Q. Blodgett"—is a conveyance of a life estate to one, with remainders in fee to the others; and the clause attempting to create the remainders is not void for repugnancy to the granting clause.—PALMER OIL & GAS CO. V. BLODGETT, Kan., 57 Pac. Rep. 947.

38. EJECTMENT—When Maintainable.—The action of ejectment by the local municipal authority is the appropriate remedy against a person unlawfully encroaching upon a public highway under its control.—OCEAN GROVE CAMP MEETING ASSN. OF METHODIST EPISCOPAL CHURCH V. BERTHALL, N. J., 43 Atl. Rep. 887.

39. ELECTIONS—Alterations in Ballots.—Under Act 1897, ch. 213, § 12, providing that a voter may alter his ballot by erasing names therefrom, or by inserting in the place of any name thereon, in writing or by a paster, the name of any person other than the one named therein as a candidate, ballots are valid on which the printed name of a candidate has been covered by a paster, bearing another name, and then, in some cases by erasure and writing in with a pen, in others by putting on still another paster, the name of the original candidate has been restored.—COUGHLIN V. MCELROY, Conn., 43 Atl. Rep. 854.

40. EQUITY—Exchange of Land—Rescission.—It is competent to a court of equitable jurisdiction, in decreeing a rescission of an exchange of land, to transfer a mortgage, with the consent of the mortgagee, that had been placed on the land received by the plaintiff in exchange, to the land restored to him, where the rescission could not otherwise be had.—STEVENS v. MCCOY, Ohio, 54 N. E. Rep. 517.

41. EQUITY—Plea—Sufficiency.—Where defendant files a plea to complainant's bill, averring facts in bar of the relief sought, and proves the averment of his plea, and the sufficiency of the plea is not tested, by demurrer or otherwise, the bill should be dismissed, though the facts averred in the plea are immaterial.—TYSON V. DECATUR LAND CO., Ala., 26 South. Rep. 507.

42. ESTOPPEL—Deeds.—Under Code, § 2084, making deeds to homesteads void unless separately acknowledged by grantor's wife, a grantor is not estopped from recovering the land by a statement that he has sold it, made to one who contemplated purchase from the grantee.—FAULK V. CALLOWAY, Ala., 26 South. Rep. 504.

43. EVIDENCE—Offer of Compromise.—A letter from a claim agent of a railroad company, offering a certain sum in settlement of a claim for the killing of a horse on the track, is inadmissible, in an action to recover for such damages, where the plain meaning of its language was an offer to pay such sum by way of compromise.—CHICAGO, B. & Q. R. CO. V. ROBERTS, Colo., 57 Pac. Rep. 1076.

44. EVIDENCE—Parol Evidence.—In a suit by a bank against the maker of a promissory note, parol evidence is inadmissible to prove that the note was executed for the purchase of stock in the bank, but under an agreement that the transaction should be merely colorable, and that the stock, although issued to the purchaser, and retained by the bank as apparent collateral security to the note, should never in reality belong to the maker of the note, nor should he ever be called upon to pay the indebtedness represented by it.—DOMINION NAT. BANK OF BRISTOL, VA., V. MANNING, Kan., 57 Pac. Rep. 949.

45. EVIDENCE—Parol Evidence.—Parol evidence of an agreement, consisting of mere oral promises, made previously or concurrently with the execution of a written contract of sale of land, is inadmissible to charge the vendee with the payment of more than the expressed consideration, when the amount to be paid plainly appears from the face of the instrument.—TRICE V. YOEMAN, Kan., 57 Pac. Rep. 955.

46. GAMING—Bills and Notes.—Under Code, § 2163, declaring that all contracts founded wholly or in part on a gambling consideration are void, a sale of slot machines, where the vendor, as an inducement to the purchase, places some of the machines, and protects their use by a reward for conviction of any one tampering with them, the contract of sale is absolutely void, and consequently notes given in consideration for it are void in the hands of an innocent holder for value.—KUHL V. M. GALLY UNIVERSAL PRESS CO., Ala., 26 South. Rep. 535.

47. GAMING—Stock Dealing on Margins.—An agreement for an actual sale and purchase of stocks validates a transaction that originated in an intention merely to wager.—IN RE TAYLOR & CO.'S ESTATE, Penn., 43 Atl. Rep. 973.

48. GAME LAWS—Constitutionality.—The legislature, may, in the exercise of its police power, and as a means of protecting game, prohibit any persons from having game in their possession, or exposing it for sale, in original packages or otherwise, during certain seasons of the year, whether such game was killed or caught in this State or any other State.—STEVENS V. STATE, Md., 43 Atl. Rep. 929.

49. GARNISHMENT—Exemptions—Liability of Garnishee.—Laws 1893, ch. 96, provides that, if the garnishee fails to appear and answer, plaintiff may proceed against him in an action in his own name, as in other cases. Held, that a garnishee who fails to answer the summons in garnishment may, when sued by plaintiff, justify his payment of the money to defendant after garnishment, on the ground that defendant had claimed it as exempt.—BLACK HILLS TELEGRAPH & TELEPHONE CO. V. MITCHELL, S. Dak., 79 N. W. Rep. 999.

50. HUSBAND AND WIFE—Mortgages—Cancellation.—The married women's acts have not changed the common law rule that the marriage of a mortgagor and the mortgagee operates to extinguish the debt, so that a mortgage executed by a *feme sole* cannot be enforced after she has married the mortgagee.—SCHILLING V. DARMODY, Tenn., 52 S. W. Rep. 291.

51. INJUNCTION—When Granted.—Though a court of equity will not determine a dispute concerning a purely legal title to lands, where no equitable question is connected therewith, it will restrain wanton injury to structures on the land in dispute, not adequately remediable at law, until the complainant shall by suit at law have his rights adjudicated.—JOHNSON V. HUGHES, N. J., 43 Atl. Rep. 901.

52. INSANE PERSON—Right of Heir to Maintain Action.—No one is entitled to be recognized as an heir of a living person, so as to authorize him to maintain a suit or proceeding in respect to the property of such person, though the latter is insane and incapable of managing his estate.—BRADFORD V. MCKENZIE, Md., 43 Atl. Rep. 923.

53. INSURANCE—Action on Policy—Limitation.—A provision of an insurance policy that "all claims under this policy shall be void, unless prosecuted by suit at law within twelve months from the date of the loss," is satisfied by the bringing of a suit on the policy in good faith within the 12 months, although such suit is dismissed, on an objection of defendant, on the ground of misjoinder, and a new suit, which is practically a continuation of the first, may be maintained, though brought after the expiration of the 12 months.—ROGERS V. HOME INS. CO. OF NEW YORK, U. S. C. C. of App., Second Circuit, 95 Fed. Rep. 109.

54. INSURANCE—Construction of Contract.—It is no defense to a contract of insurance that the loss occurred through the negligence of the assured or of his servants, unless the contract expressly constitutes such negligence a defense.—ROGERS V. ÆTNA INS. CO. OF HARTFORD, U. S. C. C. of App., Second Circuit, 95 Fed. Rep. 103.

55. INSURANCE—Statements in Application—Warranties.—When there is a distinct agreement that an application for insurance is a part of the contract, and the statements in the application are expressly declared to be warranties, they are to be treated as such, and not merely as representations, and must be strictly true, or the policy will not take effect.—AMERICAN CREDIT INDEMNITY CO. V. CARROLLTON FURNITURE MFG. CO., U. S. C. C. of App., Second Circuit, 95 Fed. Rep. 111.

56. INTOXICATING LIQUORS—Delivery by Carrier.—A carrier who transports for hire a package containing spirituous liquors, and whose only undertaking is to carry and deliver the goods, the property of the consignee, at destination, does not by delivery violate a statute, in force in the county of delivery, which provides that it shall be unlawful for any person or persons to sell, either directly or indirectly, or furnish at any place of business or any other public place, by any device whatever, any intoxicating, spirituous or malt liquors; there being in this State no provision of law which makes penal the transportation of liquors into a county where the sale of liquor is prohibited.—SOUTHERN EXP. CO. V. STATE, Ga., 33 S. E. Rep. 637.

57. JUDGMENTS—Collateral Attack.—Judgment foreclosing the lien of a street assessment cannot be collaterally attacked, personal service of defendants in the action to foreclose having been had, and they having appeared and contested the action and the validity

of the assessments, and having failed to appeal, the court having thus had jurisdiction over the person and subject-matter.—WOOD v. JORDAN, Cal., 57 Pac. Rep. 997.

58. JUDGMENT—Collateral Attack—Partnership.—Under the law of Indiana, a judgment rendered in favor of a partnership in its firm name, though reversible for error, is valid, and cannot be collaterally attacked.—MACVEAGH v. WILD, U. S. C. C., D. (Ind.), 95 Fed. Rep. 84.

59. LIFE INSURANCE—Application—Representations—Warranties.—Statements made by an applicant for life insurance, which by the terms of the policy are made a part of the contract with the insurance company, but not therein stipulated to be warranties, are not to be regarded as warranties, which cast upon the plaintiff the burden of proving them, but are to be regarded as representations, the materiality and truth of which are for the jury.—SUPREME COUNCIL OF ROYAL ARCANUM v. BRASHEARS, Md., 43 Atl. Rep. 866.

60. LIFE INSURANCE—Speculative Policy.—Deceased took out a policy for $5,000 on her life, and assigned it absolutely to her husband, who subsequently, being unable to continue the premiums, also assigned it absolutely in payment of a debt of $1,900, at a time when, if assured had lived out her life expectancy, the premiums to be paid, with interest thereon, would have amounted to $4,500. Held, not a wagering policy.—WHEELAND v. ATWOOD, Penn., 43 Atl. Rep. 946.

61. LIMITATIONS—Acknowledgment of Debt.—In order that a written "acknowledgment of an existing liability, debt, or claim" may operate to suspend the running of the statute of limitation, such acknowledgment must itself be unqualified and direct, and not dependent for its meaning upon some other writing, or upon a possible construction of its own language.—RICHARDS v. HAYDEN, Kan., 57 Pac. Rep. 978.

62. LIMITATIONS—Dissolution of Corporation—Stockholder.—When a corporation suspends business for more than a year, it is deemed to be dissolved, so far as to enable creditors to enforce the individual liability of stockholders. The right of action in favor of the creditors accrues, and the statute of limitations in favor of the stockholder begins to run, immediately after the suspension for a year, and not after such suspension is shown or determined in a judicial proceeding.—FIRST NAT. BANK OF ATCHISON v. KING, Kan., 57 Pac. Rep. 952.

63. MANDAMUS.—*Mandamus* will not lie to control the judicial action of an inferior court to correct a decree which it had full authority and jurisdiction to render, where the petitioner has a full and adequate remedy to correct it on appeal on the final determination of the cause.—EX PARTE WOODRUFF, Ala., 26 South. Rep. 509.

64. MASTER AND SERVANT—Damages—Torts of Servant.—A principal, whether an individual or a corporation, cannot be charged with punitive damages for the illegal, wanton, or oppressive conduct of a servant, unless the principal participated in the wrongful act of the servant, either expressly or impliedly, by his conduct authorizing or approving it either before or after it was committed.—FORHMAN v. CONSOLIDATED TRACTION CO., N. J., 43 Atl. Rep. 892.

65. MASTER AND SERVANT—Electricity—Independent Contractor.—One using machinery operated by electricity is reasonably bound to protect his servants from injuries caused by an unusual influx of electricity to the premises and the machinery by reason of the wire supplying his current coming into contact with other wires more heavily charged.—MORAN v. CORLISS STEAM ENGINE CO., R. I., 43 Atl. Rep. 874.

66. MASTER AND SERVANT—Presumption.—The legal presumption, in the absence of evidence to the contrary, is that a boy of 16 is capable of recognizing such patent danger as is incident to climbing on moving cars.—WORTHINGTON v. GOFORTH, Ala., 26 South. Rep. 531.

67. MASTER AND SERVANT—Torts of Servant.—A master may be held liable for an act of his servant, though willfully or wantonly committed, when it was within the scope of his employment, and done in the performance of the master's business.—BALTIMORE CONSOL. RY. CO. v. PIERCE, Md., 43 Atl. Rep. 940.

68. MECHANIC'S LIEN—Payment Without Suit.—Where one who has retained 25 per cent. of the contract price for the repair of a building, after he has knowledge of the appointment of an assignee for the benefit of the contractor's creditors, and a demand made by him for the money retained, without any order of court or any judgment as to the validity of alleged liens, pays them, he pays them at his own risk, and, if they are not valid liens, he will be liable to the assignee for the amount paid.—WILSON v. NUGENT, Cal., 57 Pac. Rep. 1008.

69. MORTGAGES—Building and Loan Associations.—Where the borrower from a building and loan association is also a stockholder, and shares in the profits arising from the business of lending its money, he will not be heard to attack the mortgage for usury.—HAYES v. SOUTHERN HOME BUILDING & LOAN ASSN., Ala., 26 South. Rep. 527.

70. MORTGAGES—Earnings under Receiver.—One who leases mining property from a corporation with full knowledge of a prior mortgage thereon, which is contested by the corporation, takes subject to all rights of the mortgagee; and, where the validity of the mortgage is sustained, he is not entitled to claim the proceeds of the mines while operated by a receiver appointed in a foreclosure suit, as against the mortgagee, on the ground that he expended money to render them productive.—G. V. B. MIN. CO. v. FIRST NAT. BANK OF HAILEY, U. S. C. C. of App., Ninth Circuit, 95 Fed. Rep. 86.

71. MORTGAGE—Foreclosure Sale.—Where a testatrix devised real estate to her husband, charged with a legacy to her daughter, to be paid from the proceeds when sold, a sale of the property under a mortgage subsequently executed by the husband, the daughter not being a party to either the mortgage or the foreclosure proceedings, conveys only the interest of the husband, and does not devest the daughter's lien.—SHRIVER v. CLAUSON, Md., 43 Atl. Rep. 925.

72. MORTGAGES — Fraudulent Representations.—A father gave his son a farm worth $5,400, and took a mortgage on it for $2,000 to secure the payment of the interest on that sum to himself as an annuity. The father did not intend to foreclose the mortgage, and so told his son. The son failed to pay the interest, and, the father having assigned the mortgage, the assignee attempted to foreclose. Held, that the father's conduct and statements did not amount to fraudulent representations which would invalidate the mortgage.—GAITHER v. SLACK, Md., 43 Atl. Rep. 915.

73. MORTGAGE—Redemption.—A mortgagor who seeks to redeem must pay the entire amount of the mortgage debt. The tender of an amount for which the property was sold under a decree of foreclosure, less than the sum of the mortgage debt and interest is insufficient.—EVANS v. KAHR, Kan., 57 Pac. Rep. 950.

74. MORTGAGES—Satisfaction of Record.—Under Code, § 1066, requiring a mortgagee to enter satisfaction on the margin of the record when mortgage is paid on the written request of the mortgagor, a letter asking the mortgagee to take the mortgage note off the record is not a sufficient request to render him liable for a failure to make such entry.—CLARK v. WRIGHT, Ala., 26 South. Rep. 501.

75. MUNICIPAL CORPORATIONS—Alleys—Railroads.—As against an objecting abutter, a city cannot grant to a railroad company the right to lay its tracks in an alley 20 feet wide, and stand cars thereon for 12 hours at a time, for the convenience of the other abutters, since it would unreasonably interfere with the use of the alley by the public in general, and with the right of access of the objecting abutter.—CORBY v. CHICAGO, R. I. & P. Ry. Co., Mo., 52 S. W. Rep. 282.

76. MUNICIPAL CORPORATIONS—Mode of Procedure to Refund Indebtedness.—There is nothing in the statutes of Kentucky relating to cities of the third class which requires that the city council, in making provisions for the refunding of an indebtedness of the city, shall proceed by ordinance, rather than by resolution, and in the absence of such requirement a resolution is a proper method of procedure in such case.—ROBERTS & CO. v. CITY OF PADUCAH, U. S. C. C., D. (Ky.), 95 Fed. Rep. 62.

77. NEGLIGENCE—Electric Wires.—It is negligence for an electric light company, in making alterations in its line, to allow a wire to lie on the sidewalk, without guard or warning, in a position where it is liable to come in contact with heavily charged wires, whereby a pedestrian stepping on it is injured.—DEVLIN v. BEACON LIGHT CO., Penn., 43 Atl. Rep. 962.

78. NEGLIGENCE — Obstruction of Sidewalk.—Every person occupying lands abutting upon a public street has a right to obstruct the sidewalk in front thereof for a reasonable time in order to move heavy merchandise to or from his premises, provided he does so in such a way as not to interfere with its use by the public to a greater extent than is necessary for the purpose, and does not thereby become bound to furnish to the passer-by a safe passage around the obstruction.—TOMPKINS v. NORTH HUDSON RY. CO., N. J., 43 Atl. Rep. 885.

79. NOTARY — Acknowledgment — Qualification.—A cashier of a bank, who is not a stockholder, and is employed on a fixed salary, and whatever fees he receives as a notary are his individually, is not disqualified to take an acknowledgment to a mortgage given to the bank.—BANK OF WOODLAND v. OBERHAUS, Cal., 57 Pac. Rep. 1070.

80. NUISANCE—Abatement by Municipality.—That disorderly and lewd persons are allowed to occupy a building, and it is permitted to become filthy and unsightly, resulting in its being a constant source of annoyance to all parties residing in its vicinity, and causing a depreciation in the value of surrounding property, does not justify a municipal corporation in destroying the building, as only the wrongful use can be stopped.—BRISTOL DOOR & LUMBER CO. v. CITY OF BRISTOL, Va., 33 S. E. Rep. 588.

81. PARTNERSHIP—Action on Partnership Note made after Dissolution—Burden of Proof.—Where *non est factum* is pleaded in defense to an action on a partnership note seeking to charge the estate of a deceased partner, and it appears that the note was executed after the dissolution of the firm, the burden of proof is upon the plaintiff to show that it was executed by said partner, or that it was done under his authority.—HARWELL v. PHILLIPS & BUTTORFF MFG. CO., Ala., 26 South. Rep. 501.

82. PLEDGES — Rights of Pledgee — Estoppel. — A pledgee of bonds as secondary security, to make good any deficiency there may be after other security has been exhausted, by whose act or with whose consent the primary security has been rendered unavailable for payment of the debt, is estopped from claiming that the contingency will ever arise to entitle him to subject the pledge to its payment.—HERRMANN v. CENTRAL CAR TRUST CO., U. S. C. C., S. D., (N. Y.), 95 Fed. Rep. 55.

83. POWER OF LIFE TENANT—Mortgage for Improvements.—Where land has been devised to a widow for her use and benefit for her life, a mortgage thereon, given by her to pay for valuable improvements made by her upon it for her benefit, is an equitable incumbrance upon the estate of the remainder men, although the will gave her no express power to mortgage.—IN RE JENKS, R. I., 43 Atl. Rep. 871.

84. PRINCIPAL AND AGENT.—Where a contract does not show on its face that the person named was acting as agent of anybody, and no reference is made to the alleged principal, and on trial no offer is made to prove that the person named in the instrument was acting for the alleged principal, and with his authority, in executing the contract, and the person named in the contract testifies that he had no authority to sign it for the alleged principal, such contract is inadmissible in evidence against the alleged principal.—ESTRELLA VINEYARD CO. v. BUTLER, Cal., 57 Pac. Rep. 980.

85. PRINCIPAL AND AGENT—Previous Course of Business.—Where an agent for a long time has conducted his principal's business in a certain way, one who has dealt with him has a right to presume that his methods met with the approval of his principal, and is justified in continuing to so deal with him.—WELCH v. CLIFTON MFG. CO., S. Car., 33 S. E. Rep. 739.

86. PRINCIPAL AND SURETY—Suit by Surety to Compel Indemnity.—A surety on an undertaking given to procure a temporary injunction cannot maintain a suit in equity against the principal in the nature of a bill *quia timet*, to require indemnity against the risk assumed, where he has paid nothing on account of it, and the suit in which the undertaking was given is still pending on appeal and undetermined, until which time there is no liability on the bond on the part of either principal or surety.—AMERICAN BONDING & TRUST CO. OF BALTIMORE CITY v. LOGANSPORT & W. V. GAS CO., U. S. C. C., D. (Ind.), 95 Fed. Rep. 49.

87. PROCESS—Malicious Use of Legal Process.—Recovery cannot be had for seizure of goods under a writ of foreign attachment, though the writ was issued on the same day, but after close of banking hours, when the note of defendant in attachment to plaintiff in attachment, payable at a bank, became due, and was not paid, but protested; the right to issue the writ at that time being supported by a preponderance of authorities, and there being at the time no decision on the point in the State where the writ issued, all the facts to authorize its issue being present, and there being no proof of malice, or malicious use of the process, but the facts and circumstances dispelling any inference of malice.—HUMPHREYS v. SUTCLIFFE, Penn., 43 Atl. Rep. 954.

88. QUIETING TITLE.—A suit to remove a cloud on title cannot be maintained by one not in possession.—KANE v. VIRGINIA COAL & IRON CO., Va., 33 S. E. Rep. 627.

89. RAILROAD COMPANY—Injury to Stock — Trespassers.—The owner of a farm, in the possession and use thereof, divided by a railway passing through it, over which is constructed and maintained a private way, in the lawful use thereof does not occupy the position of a trespasser.—ATCHISON, T. & S. F. RY. CO. v. CONLON, Kan., 57 Pac. Rep. 1063.

90. RAILROAD COMPANY—Negligence—Implied Invitation.—Where the residents along a fenced railroad track, without the railroad company's consent, build a stile over the fence, in order that they may go directly across the tracks to the station and the street beyond, instead of going around by the public road, the acquiescence of the company does not amount to such an invitation as to make it liable for want of ordinary care towards persons crossing at that point.—DEVOE v. NEW YORK, O. & W. RY. CO., N. J., 43 Atl. Rep. 899.

91. REAL ESTATE BROKER — Taking Commissions From Both Parties.—If the duty of a real estate broker is simply to bring together two persons who desire to exchange their lands, and the broker's entire duty is performed when he has brought them together, he is a mere middleman, not representing conflicting interests, and may receive compensation from both parties.—CLARK v. ALLEN, Cal., 57 Pac. Rep. 985.

92. STATUTE—Validity—Courts.—A legislative enactment, incapable of interpretation and enforcement because of irreconcilable conflict of meaning between its principal provisions, will be held inoperative and void.—IN RE HENDRICKS, Kan., 57 Pac. Rep. 965.

93. SUBROGATION. — Where the owner of premises pays off a senior lien, without actual knowledge of the existence of a junior lien, it will be presumed that he made the payment for his own benefit; and for the

protection of his interests, and equity will treat such owner as the assignee of the original senior lienholder, and will revive and enforce it for his benefit.—DARROUGH v. HERBERT KRAFT COMPANY BANK, Cal., 57 Pac. Rep. 983.

94. SUBROGATION—Vacation of Judgment.—Where a sheriff obtains a judgment against a defaulting bidder at a sale of property of a decedent, the judgment debtor will not be subrogated to the rights of the widow, who is his debtor, to a life interest in one-third of the money represented by the judgment, so as to excuse payment thereof.—HUGHES v. MILLER, Penn., 43 Atl. Rep. 976.

95. TAXATION—Tax Deeds.—Where one has complied with the law in applying to purchase State lands, he is entitled to his deed; and when a void deed has been issued, and the original owner applies to the auditor general and tenders the full amount of taxes due, the auditor general cannot refuse the certificate of error that he is entitled to.—HUBBARD v. AUDITOR GENERAL, Mich., 79 N. W. Rep. 979.

96. TRESPASS — Action by Mortgagor. — In a suit brought by the owner and mortgagor of lands against a trespasser, before suit brought by the mortgagee, the owner is entitled to recover compensation for the entire damage done to the premises, and such recovery will be a bar to a subsequent suit by the mortgagee; but the court will so exert its equitable powers to control the disposition of the sum recovered that no justice may be done.—DELAWARE & A. TELEGRAPH & TELEPHONE CO. v. ELVINS, N. J., 43 Atl. Rep. 903.

97. TRESPASS—Who May Maintain—Vendee of Land. —A vendee of land upon which a trespass had been committed while it was the property of his vendor has no right of action against the trespasser for damages thus occasioned which were recoverable by the vendor. *Aliter*, as to new and additional damages growing out of a continuation of the original trepass after the vendee acquired title.—ALLEN v. MACON, D. & S. R. CO., Ga., 33 S. E. Rep. 696.

98. TRUSTS—Accounting.—Where money is received to be invested and held in trust, and after investment the trustee withdraws the money without the beneficiary's knowledge, and mingles it with his own funds, an accounting is necessary to enforce the beneficiary's rights, and, since a trust is involved, it can be obtained only in equity.—TAFT v. STOW, Mass., 54 N. E. Rep. 506.

99. TRUSTS — Powers — Wills. —Where one conveys property in trust, to be held for the benefit of such "charitable corporations" as he may appoint by will, a testamentary direction to his executor, an individual, to expend a certain sum in providing free excursions for poor children is valid, and the executor may give the money to a charitable corporation to be so expended.—LORING v. WILSON, Mass., 54 N. E. Rep. 502.

100. TRUSTS—Res Judicata—Fraud.—When a suit is brought against a trustee, seeking to charge the trust estate with a debt for which the trustee is only personally liable, this fact being known to the plaintiff, a judgment rendered therein against the trustee will not be conclusive upon the beneficiaries of the trust, unless it appear that such beneficiaries were *sui juris*, and were parties to the suit or consented to the judgment. The conduct of the plaintiff in bringing such an action subjects him to the charge not only of implied, but of actual, fraud.—SNELLING v. AMERICAN FREEHOLD LAND MORTG. CO. OF LONDON, Ga., 33 S. E. Rep. 634.

101. TRUST—Resulting Trust—Evidence.—In ejectment to enforce a resulting trust, the trial judge acts as a chancellor, as to the question of the existence of such trust; and if, in his judgment, the evidence is insufficient to establish it, the case should not be submitted to the jury.—BOWEN v. HAUPT, Penn., 43 Atl. Rep. 963.

102. VENDOR AND PURCHASER — Exemptions—Judgment—Mortgage Lien.—One who takes a mortgage upon land purchased with the proceeds of exempted property, and who knows, or is chargeable with notice, that such was the fact, acquires his lien subject to the exemption right.—JOHNSON v. REDWINE, Ga., 33 S. E. Rep. 676.

103. WIFE'S SEPARATE ESTATE—Sale to Husband's Creditor.—Where a husband, for the purpose of paying his debt, sells to his creditor personal property of his wife, and the creditor knows all the time that the property belongs to the wife, such creditor acquires no title thereto, although the wife consented to the sale or transfer.—GRANT v. MILLER, Ga., 33 S. E. Rep. 671.

104. WILLS—Designation of Legatee.—An institution the primary purpose of which is to take such girls, not under 14 years of age, as choose to go to it, and train them for special vocations in life, is not an orphan asylum, within the terms of a bequest to the orphan asylums of San Francisco.—IN RE PEARSON'S ESTATE, Cal., 57 Pac. Rep. 1015.

105. WILL—Devise—Joint Devisees.—The abolition of the doctrine of survivorship does not affect the common-law rule that where a devise is to several jointly, and one of them dies in the testator's lifetime, his share does not lapse, but the others are entitled to the entire property.—LOCKHART v. VANDYKE, Va., 33 S. E. Rep. 618.

106. WILLS—Execution of Power of Surviving Executor.—A will directed payment of debts, and then created a life estate in the widow, remainder to third persons, and named the widow and a friend of testator as executrix and executor, authorizing "my executor and executrix" to sell realty in their discretion, releasing them from giving bond. Held that, on the friend's death, the widow as executrix might exercise her power for the purpose mainly of paying debts.—FITZGERALD v. STANDISH, Tenn., 52 S. W. Rep. 294.

107. WILLS—"Grandchildren" as Included in Term "Children."—Under a devise in trust during the life of testator's granddaughter, on whose death her children are to take the estate in equal portions, a grandchild of the life tenant, the death of whose parent, one of the beneficiaries, preceded that of the life tenant, will not take the share that would have belonged to the parent; the term "children" not including grandchildren.—LOGAN v. BRUNSON, S. Car., 33 S. E. Rep. 737.

108. WILLS—Life Estate—Codicil.—Where a testator bequeathed the residuum of his estate to his children, in equal shares, the heirs of a deceased son to take one share, these heirs take nothing under a codicil providing that the share of one of the daughters should be divided among her brothers and sisters on her death. —MCKEE v. MCKEE, Tenn., 52 S. W. Rep. 320.

109. WILLS—Survivorship—Trusts.—A provision in a will that, in the event of the death of one or more of the devisees, his, her, or their share is given to those surviving, has reference to devisees who die before testator; hence devisees living at the death of testator take their shares freed from conditions.—ARMISTEAD'S EXRS. v. HARTT, Va., 33 S. E. Rep. 616.

110. WILLS—Trusts—Perpetuities.—A will bequeathed two funds absolutely, payable when the legatees should become of age. A codicil provided that the funds should be held in trust for the legatees, the trustees to pay them and their heirs the interest thereon "forever." Held, that there was no gift of the *corpus* of the funds to the legatees, and on their death the principal was payable to their heirs.—WEISER v. ZIEGLER, Penn., 43 Atl. Rep. 964.

111. WITNESS—Transaction with Decedent.—Section 833, ch. 95, 2 Gen. St. 1897, which provides that "no party shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person," does not apply to an agent of a party to the action, such agent not being a party to the action, nor having any legal interest in the result of it.—CARROLL v. CHIPMAN, Kan., 57 Pac. Rep. 979.